TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~22~~ 18.

THE TERRITORY OF NEW MEXICO *EX REL.* E. J. McLEAN & COMPANY, APPELLANTS,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED MARCH 24, 1905.

(19,681.)



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

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vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 2, 1905.

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1 Be it remembered, that heretofore, on to wit the sixth day of December, A. D., 1901, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, a transcript of record in a certain cause therein pending entitled, The Territory of New Mexico *ex rel.*, E. J. McLean & Company, appellants and The Denver & Rio Grande Railroad Company, appellee, which said transcript of record was and is in words and figures, following to wit:

2 TERRITORY OF NEW MEXICO, }
County of Santa Fe. }

Pleas before the Honorable John R. McFie, associate justice of the supreme court of the Territory of New Mexico and judge of the first judicial district thereof, and of the district court within and for the county of Santa Fe, in said district.

Be it remembered that heretofore, to-wit, on the 25th day of September A. D. 1901, there was issued out of the office of the clerk of said court, a writ of mandamus, which said writ of mandamus is in the words and figures as follows to-wit:

In the District Court of the First Judicial District of the Territory of New Mexico Sitting in and for the County of Santa Fe.

TERRITORY OF NEW MEXICO, *ex Rel.* E. J. McLEAN & Company, *vs.* THE DENVER & RIO GRANDE RAILWAY COMPANY. } No. 4315.

The Territory of New Mexico, to the Denver & Rio Grande Railroad Company, Greeting:

Whereas, our said court has been given to understand upon the information of E. J. McLean & Company, relator:

1. That said relator is a partnership doing business at Denver, in the State of Colorado where it has principal offices and place of business, and is non-resident of the Territory of New Mexico; that it has an agency at Santa Fe, in the Territory of New Mexico, and is engaged in the purchase, storing and trafficking in wool and hides in the Territories of New Mexico and Arizona and in the State of Colorado, and engaged further in the marketing and shipping of hides to the general markets therefore in the United States of America, to-wit, at the cities of Chicago, in the State of Illinois, New York in the State of New York, and Boston, in the State of Massachusetts, and in the importation into the Territory of of New Mexico of hides from the Territory of Arizona and the State

3

of Colorado, and in general dealing and trafficking in hides originating in the said Territories of Arizona and New Mexico, the Republic of Mexico, and the States of Colorado and Texas; also in the storing of hides so gathered and purchased by it, at the cities of Santa Fe, Albuquerque and Las Vegas, in the said Territory of New Mexico and the re-shipment thereof at such times as may be convenient and advisable in the course of said trade and business, to Denver, in the State of Colorado, destined for the general markets aforesaid in Chicago New York and Boston, and to the said cities of Chicago, New York and Boston direct.

2. That the respondent railroad company is a company engaged in operating a line of railroad extending from the city of Santa Fe northward beyond the boundary of the Territory of New Mexico, into the city of Denver, in the State of Colorado and engaged in carrying of freights and passengers over its said line for tariffs, rates and charges by it publicly advertised, and as a common carrier, and was so engaged in business as aforesaid at all times hereinafter stated.

3. That heretofore, to-wit, on September 7th 1901, in the due course of its business as aforesaid, relator placed upon its transportation wagons used by it for freighting goods designed for railroad shipment, one certain bale of dry hides, of the weight then and there of 970 pounds, the same being then and there pre-
4 pared and baled for shipment according to the custom of trade in that respect by being compressed by mechanical means, known technically as "machine compressed," the object of the said compression being to enable said relator to get the minimum weight at least allowed by said respondent on car-load shipments into the car to be used by respondent in carrying the same and being then and there securely baled and packed in compact form, in accordance with the custom in said trade and shipping, the said bale being marked "Mc610," and consigned to E. J. McLean & Co., Denver, Colorado; that said bale of dry hides so marked and compressed as aforesaid, was on said wagons hauled to the depot of respondent, and deposited as was customary in shipping between relator and respondent, into the custody of respondent, and upon its freight platforms provided by respondent for the reception of freight, and relator thereupon prepared and laid before the respondent's agents the customary shipping receipt, in triplicate, for the said hides; that each and all of relator's doings in and about the matters and things aforesaid were exactly in conformity with the trade custom which had been built up by similar dealings between relator and respondent, during more than five years next preceding the said transaction.

4. That thereupon, respondent declined to execute the said shipping receipt, as it has usually and customarily done in such matters, and as it was its legal duty to do, and declined to execute the same in any manner whatsoever, but instead notified relator in writing that relator's "shipment of one bale dry hides offered for

shipment this date (September 7th 1901) destined beyond the
5 boundary of this Territory, remains on our (respondent's)
platform subject to your (relator's order), that "the laws of the Territory do not permit of the forwarding of hides beyond the boundary line without having first secured a certificate of inspection from the cattle sanitary board;" and that "therefore, we, (respondent) are unable to handle the shipment referred to without such certificate;" which said shipping receipt, in triplicate, so tendered to respondent, together with said notification in writing so made by respondent to relator, are filed in this action, marked Exhibit "A."

5. That said shipment so offered to said respondent, consigned beyond the limits of the Territory of New Mexico, contained 29 steer hides and 17 cow hides, which had been purchased and gathered by relator in the general course of trade and trafficking therein in its business as aforesaid, and had been in the possession of relator at its ware-house in the city of Santa Fe aforesaid, for a period not less in instance than thirty days, and running from such period, to three months or more during all of which time the same were held by relator open and subject to inspection by the public of by any sheriff, constable, or inspector desiring to make inspection thereof for any purpose whatsoever, and during which time relator had at various times offered to the cattle sanitary board of New Mexico and its secretary and inspectors full privilege and facility to inspect the same, should they so desire, but they and each of them had failed and neglected so to do.

6. That said shipment so offered by relator to respondent was made with the usual and customary understanding that the freight
rates and charges of said respondent for the transportation
6 thereof should be paid upon delivery to the consignee of the
same at its destination, and the shipment of said bale of hides was not refused by said respondent on said account, as will appear by said Exhibit "A."

7. That the refusal of respondent to transmit the said hides to their destination beyond the limits of the Territory of New Mexico was made solely by reason of a certain statute attempted to be passed by the 34th Legislative Assembly of the Territory of New Mexico, being entitled "An act relative to peddling of meats and for other purposes" appearing as chapter XLV, of the published laws of 1901 of the Territory of New Mexico, an authenticated copy of which is hereby filed marked Exhibit "B," in this action, and by reason of the fact as recited in the written statement made by respondent contained in Exhibit "A" filed in this action, that no tags had been attached to said hides by any inspector of that certain board known as the cattle sanitary board of New Mexico.

8. That the refusal of said respondent to forward the said bale, hauled and placed in transit and shipped by relator, was and is illegal and unjustifiable under the said pretended statute, because the said pretended statute was at the time of its passage and ever

since then, has been, void, unlawful, illegal, and unauthorized and beyond the power of the said Legislative Assembly of the Territory of New Mexico to pass or enact; and further, in specification of such illegality of said pretended statute, relator shows and gives the court to understand and be informed:

a. That the said pretended act in so far as the same pretends to cover the premises herein, is contained only in sections 3 and 4 of said "act relative to peddling of meats and for other pur-
7 poses," which said sections 3 and 4 constitute a separate and distinct enactment, foreign in its matter and terms to the remainder of said act, contained in the 1st, 2nd and 5th sections thereof, and surreptitiously injected into said enactment as entitled, and as such has neither title nor enacting clause.

b. That the said pretended enactment, as completely contained in said sections 3 and 4, unlawfully attempts to legislate and discriminate against the exportation of an article of commerce over the lines of railroad companies and common carriers, without any application whatever to the exportation of the same by other means or by private freighting.

c. That said pretended enactment, as completely contained in said sections 3 and 4, imposes an obstacle and burden upon commerce among the several States of the United States, making the performance of the said statute and commerce thereunder practically impossible; in that it requires that all hides offered for shipment beyond the boundaries of the said Territory of New Mexico shall have been inspected and tagged by an authorized inspector of the cattle sanitary board of New Mexico, "for the district in which such hides originate," it being the fact that in the process of trade and trafficking in hides in the Territory of New Mexico, and by said relator as aforesaid, hides originating in every county and district of the said Territory of New Mexico, from the county of San Juan to the county of Eddy are sold and bargained from hand to hand, without record or bill of sale, but simply as other chattels, until finally the same are gathered and purchased by relator and stored in relator's said warehouses in Albuquerque, Santa Fe and Las Vegas,
8 and it being further the fact therefore that to make an inspection according to the terms of said pretended statute would require the attendance at Albuquerque, Santa Fe and Las Vegas, of some twenty-five inspectors, each being from the various districts of the Territory of New Mexico, to the remotest part thereof, whence the said hides have originated.

d. That said pretended enactment as completely contained in said sections 3 and 4, imposes a prohibitive obstacle and burden upon commerce among the several States of the United States, making the performance of the said statutes and the transaction of business thereunder impossible, in that it requires that all hides offered in New Mexico for shipment beyond the boundaries of said territory by railroad or common carrier, shall bear a tag evidencing an inspection by an inspector for said cattle sanitary board for the

district where said hides originated, and in so doing prohibits the receipt by any railroad company or common carrier of all hides not so inspected or tagged, whether the same be New Mexico, Colorado, Texas, Mexico or Arizona hides; it being the fact that relator stores many hides gathered and purchased in Arizona, in its warehouses in New Mexico, awaiting the appropriate and most advantageous time for marketing and shipping the same; wherefore, under the said pretended enactment, said hides from Arizona cannot be re-shipped out of the Territory of New Mexico without inspection and tagging, which inspection and tagging cannot be performed because no inspector exists for the district whence said hides have originated, the same being beyond the boundaries of the Territory of New Mexico; that by operation of said pretended enactment, hides imported and stored in New Mexico, are thenceforth utterly and
9 entirely prohibited from re-shipment beyond the limits of the Territory of New Mexico, and interstate commerce therein destroyed.

e. That said pretended enactment, contained in said sections 3 and 4, only assumes to lay a fee or charge for inspection upon hides when the same are destined for shipment beyond the Territory of New Mexico, and is not attempted to be executed by said cattle sanitary board upon hides so long as the same are bargained and sold and shipped by railroad or common carrier in inter-territorial trade or in the markets of the Territory of New Mexico; but the same is pretended to disqualify only for interstate commerce any hides uninspected and untagged, while leaving the same free and open to trade within the said Territory.

f. That said pretended enactment, contained in said sections 3 and 4, attaches its fee of charge only when the said hides are "offered for shipment" beyond the limits of the Territory of New Mexico and does not attach its fee or charge to any hides not so designed or offered for exportation; the shipment prohibited being further only that by railroad or common carrier, whereby the said fee or charge becomes a tax imposed exclusively upon commerce among the several States by railroad or common carrier.

g. That said pretended enactment, contained in said sections 3 and 4, undertakes to impose said fee or charge not only upon hides originating in the Territory of New Mexico, but upon hides originating in other States or Territories, or in the Republic of Mexico, and brought into or stored within the Territory of New Mexico, when the same are offered for re-shipment out of said Terri-
10 tory; it being the fact that relator in this action gathers many hides from the said Territory of Arizona, and holds them in warehouses in the Territory of New Mexico as aforesaid, awaiting the appropriate and most advantageous time for the marketing of the same.

h. That said pretended enactment, contained in said sections 3 and 4, undertakes to impose an excessive fee or charge upon all hides intended for exportation, the same being ten cents per hide,

without reference to the value of the said hide, and the value of hides so dealt in and exported from the said Territory of New Mexico being: for horse hides, 50 cents to $1.00; bovine hides, including calf skins, from 10 cents to $1.00; goat hides, 5 cents to 90 cents; sheep hides 2 cents to 50 cents; mule hides 50 cents to $1.00; the said fee or charge of ten cents per hide for such inspection being excessive and out of all proportion to the value of such hides, and being unequal and unjust taxation thereof.

4. That said pretended fee or charge is largely in excess of the amount of fee or charge which might be absolutely necessary for the making of an inspection such as is required by said pretended enactment, it being the fact that hides as aforesaid are gathered for exportation, in car load lots, in the said towns of Albuquerque, Santa Fe and Las Vegas, and that shipments are made from said points about twelve to fifteen times per year, on an average; that at such times there are on hand for shipment large numbers of hides, varying from 1000 to 3000, and that the same can be inspected at the rate of at least 400 per day, before being baled and compressed for shipment as hereinafter stated; that at such rate of inspection the amount of such inspection fees would be at least forty dollars
11 per day, whereas the fees and compensation of an inspector of the cattle sanitary board are fixed by law at $2.50 per day and necessary expenses, which said expenses could not exceed $5.00 per day in the discharge of his duties.

5. That said pretended fee or charge so imposed upon interstate commerce is not by law used to cover the expenses of said inspection, nor paid to said inspector for his per diem or expenses, but is directly by law attempted to be appropriated to the general fund for the support of the said cattle sanitary board in all its functions, the said fund being known as the cattle indemnity fund, out of which the said board pays: the compensation of the veterinary surgeon employed by it, not more than $1,500.00 per year and actual necessary expenses, the duties of which said official relate exclusively to quarantine and health service, and are confined to cattle, and have nothing to do with hides; the compensation of assistants employed by said board, at $2.50 per day and expenses, their duties being generally in quarantine service and the inspection of slaughter houses; the compensation of other assistants who may be requisite, under section 190 of the compiled laws of 1897, in the sanitary protection of cattle, whose duties have naught in common with the inspection of hides; the actual and necessary expenses of the sessions of the cattle sanitary board and the expenses for books and records necessary under the quarantine regulations, and for salary of secretary; expenses incurred in the slaughter of infected animals under the quarantine regulations, and for burning the carcasses thereof; all indemnities to owners of cattle for cattle destroyed under the quarantine statutes; expenses for inspecting slaughter
12 houses and general expenses of said board, whereby the said inspection fee or charge assessed against hides designed for

extra-territorial shipment by railroad or common carrier becomes purely a tax for general revenue purposes and not solely or exclusively for the making of the inspection therein mentioned.

[illegible]. That the said pretended inspection is impos — becomes purely a tax for general revenue purposes and under the established customs and usage of interstate trade in hides, for the reason that at the time when said hides are offered for shipment and the necessity for inspection under the said act attaches, the said hides are, (by the customs of trade and in order to secure advantageous freight rates, so that the said commerce may be carried on and the hides of New Mexico may be marketed in the markets of the world on equal terms with the hides of other portions of the United States of America) first compressed by machinery into a hard and compact mass, getting the greatest possible weight into the smallest possible compass, and then bound and baled by wire, in such compressor, in bales containing from thirty to one hundred and fifty hides, and so offered for shipment, the intent being to get the greatest possible number of hides into a car such as is commonly used by railroad companies, and such course being necessary by reason of the close competition in hides throughout the said United States and the necessity for economy in their shipment and marketing, in modern business methods, and such compression of hides being practiced by all shippers throughout the country, in order so to compete in marketing the same; that by the terms of said statute, it is thereupon attempted to impose upon the railroad company or common carrier, by
13 criminal responsibility, the duty of examining minutely each hide which has been so packed, baled and wired as preliminary to its offer for shipment, to ascertain whether or not each of such hides bears an inspection tag, no provision being made by said law for the tagging of any bale of hides, nor for the issuance of any certificate of inspection thereon; that, to comply with the said statute, the customs and methods of trading and exporting hides would be utterly destroyed and ruined, in the opening by said railroad company or common carrier of such bales, thereby releasing compression thereon and necessitating another compression of said hides for shipment, at the warehouses of said relator, and a rebaling of the same for shipment; whereupon, it would again be impossible for the said common carrier to know whether or not the hides contained in said package, so rebaled, were tagged or inspected or not, though such common carrier would again be held to criminal responsibility in the premises.

[illegible]. That the larger portion of the hides produced in New Mexico and Arizona and by said relator stored in New Mexico and shipped, at advisable times to the general hide markets of the country, are marketed in the cities of Chicago, New York and Boston; that the proximity of manufactories for the working of leather, and tanneries for the tanning of the same, and forests producing bark for the making of tannic acid, necessary in the working of such hides into leather, have established these three cities as the centers of com-

merce in hides in the United States of America; that the market value and price of hides in said cities fluctuates, as does that of any other general commodity produced by industry and marketed in the course of interstate commerce, in the United States of America, and that it becomes, therefore, and
14 is, important to the buyers of hides and shippers thereof, all through the country including relator, in order to successfully transact business in such hides in competition with similar dealers and traders throughout the United States, to know by telegraphic advices the prevailing price of such hides from day to day and the market fluctuations thereof, and immediately at such times as may be advantageous and advisable, to market such hides by telegraphic bargains and sale, and to contract for the immediate delivery thereof, in said cities of Chicago, New York and Boston, by fast transportation as soon as the same may, by the use of modern business methods and railroad facilities, be accomplished; that, not to observe these conditions and transact business as rapidly as possible, utilizing all the facilities of modern commercial usuage, would be to fail utterly to get the hides so produced in New Mexico and Arizona, into the said markets, and would result in the abandonment of interstate dealings in hides, so far as the producers of hides in this Territory were concerned; that by the terms of said inspection law, no time is specified for inspection, nor is the said cattle sanitary board nor any inspector placed under any legal obligation to make inspection at any time, or with any diligence, nor is any remedy provided or given to relator by which the inspection of such hides by said board or its officers can be compelled at any time or place, nor is any remedy given the shipper for the utter failure of said board and its officers to do their duty in this behalf at any time, nor are the said hides made subject to taxation in any sense until the same are offered for extra-territorial shipment; that, in consequence thereof, it is impossible for relator promptly or in a business like way, or in equal competition with other dealers
15 throughout the United States to market his said hides, but, when relator may have concluded to ship the same, it would become necessary, under the operation of said law, to await the pleasure and convenience of the inspectors of said cattle sanitary board, gathered from all the various districts of the Territory of New Mexico, to inspect and tag the said hides so as to qualify the same for shipment; that in these matters and things the said law is impractical, unenlightened, and barbaric in its disregard of the necessity of modern business methods, and a gross and ruthless interference with interstate commerce.

m. That the said law is unequal in its imporition upon extra-territorial shippers of hides of infinite delay in the inspections of their hides, until the pleasure or convenience of the inspectors, whereas butcherers and slaughterers of cattle within the Territory of New Mexico are only required to hold the same for inspection for thirty days after killing; it being further the fact that each and all

of the hides so offered for shipment by relator are of the class known as "dry hides" and necessarily of the age of from thirty to sixty days or more, and that a large percentage of them have come from the hands of butchers who have held them for inspection the thirty days required by law.

n. That the said law interferes with interstate commerce in requiring the holding of hides designed for extra-territorial shipment, until the same have been inspected at the pleasure and convenience of the cattle sanitary board, and discriminates against interstate commerce in so providing and in requiring a tax or charge to be paid thereon, and in providing the limited term of thirty days for the inspection of such hides when in the course of local trade, and in not requiring *and* fee or charge thereon.

16 *o*. That the pretended inspection provided for by said act is without purpose or object as an inspection law, requiring only the keeping of a memorandum of the brands and the name of the shipper, otherwise called the purchaser, which data can have no legal efficacy for the protection of the health or property or safety of the people of the Territory of New Mexico; that no provision is made for the withholding from shipment of any unbranded hides, or of any hides which the inspector may have reason to believe have been dishonestly taken by any person, or for the withholding of any hides which may appear to be infected in any way, but the same are entitled to be tagged and shipped, that instead of protecting the property, health, morals or safety of the people of New Mexico, the said law thus facilitates the exportation of stolen or infected hides, which being tagged are entitled to be taken beyond the boundaries of the Territory of New Mexico by railroad or common carriers, and are always, without tags or inspection, permitted to be taken beyond said boundaries by private exportation; that the keeping of a record of the brands and the name of the shipper affords no conceivable remedy to the original owner of such hide, nor to any intermediate owner, in case the same has been stolen from him, nor does it avail him anything to be able to trace the property so stolen to any outgoing freight car carrying the same away from New Mexico, as no record of the consignee is required to be kept; nor does the said act on the other hand afford any assistance in the detection of any possible thief of such hide in the Territory of New Mexico, inasmuch as no record of the person who sold the hide to the shipper is required to be kept, or can be legally exacted under such law, nor does such enactment in any way aid or give

17 assistance to any section or article in the penal code of the Territory of New Mexico; wherefore the said statute utterly and entirely fails to establish a police regulation of any efficacy whatever, but simply makes an indefinite memorandum of useless facts, containing the fact that the shipper named has exported from the Territory a certain number of hides, bearing certain brands, or bearing no brands at all, and which said hides may have originated in the Territory of Arizona, the Republic of Mexico, the State of

Colorado, the State of Texas, or the Territory of New Mexico, and which said hide may have been in the possession and in the warehouse of said shipper for any term or period from thirty days to about a year.

p. That the said inspection law is incapable of due or reasonable execution for the reason that when hides have been stored, as is customary in trade therein, in warehouses, the same are classified by their quality, and the place of their origin is lost sight of, whence it becomes impossible to tell in what district of New Mexico, such hides may have originated, or whether in New Mexico at all; and for the further reason that in bartering and trading from hand to hand throughout the country said hides are oftentimes exposed to the weather, and become hard and damaged thereby, and it becomes impossible in many instances for any inspector or other person to decipher the brand thereon.

q. That said pretended statute attempts to tax the property on non-residents greater than the property of residents of the Territory of New Mexico, in laying a tax only upon hides going out of the Territory of New Mexico upon sales made to interstate purchasers of hides in the cities of Chicago, Boston and New York, and
18 in not laying such tax upon hides remaining within said Territory and used for local consumption.

r. That said pretended inspection law is an attempt to regulate commerce among the several States of the United States and between the Territory of New Mexico and such States.

s. That such pretending statute is an attempt unlawfully to levy an export duty upon hides going out of the Territory of New Mexico and across its boundaries, into the States of Texas and Colorado and other States of the United States and into the Territory of Arizona, and into the Republic of Mexico, the same not being absolutely necessary for the execution of any existing inspection laws of the Territory of New Mexico.

t. That no inspection laws, as such, exist on the sub-ect matter of said statute, within the Territory of New Mexico, and no fee or charge can be laid for such purpose upon exports until legal inspection enactments have been made in the premises.

u. That said pretended enactment denies to the citizens of each State all privileges and immunities of citizens in the several States, and attempts to abridge the privileges and immunities of citizens of the United States.

v. That said pretended enactment is repugnant in its several sections, providing different degrees of punishment for the violation of the same provisions.

w. That said pretended enactment discriminates against commerce in hides and citizens engaged therein.

x. That no law exists creating the office or employment of inspector for any district in New Mexico.

9. That despite the matters and things aforesaid respond-
19 ent continues to fail and refuse and neglect to do its duty in the premises, or to transport or carry the said bale of hides

from its said depot to the destination thereof at Denver, in the State of Colorado; wherefore relator is unable to transact its interstate commerce as aforesaid, and is without any plaint, speedy or adequate remedy in the ordinary course of law and the public business is thereby embarrassed and hindered by the said unlawful neglect and refusal of said respondent to forward the said shipment as aforesaid;

Now, therefore, we being willing that full, speedy and exact justice shall be done in the premises, do commend you, the Denver & Rio Grande Railroad Company, that immediately upon the receipt of this writ you do execute and forward to its destination, to-wit, E. J. McLean & Company, Denver, Colorado, that certain shipment of one bale dry hides marked "Mc610" and of the weight of 970 pounds, tendered and offered for shipment to you by said relator, E. J. McLean & Company; or that you show cause before this court at the chambers of the judge in the court house, at ten o'clock a. m., on the 3rd day of October, A. D. 1901, why you have not so done, and that you then and there return this writ with your certificate of having done as commanded herein.

By order of the court.

Witness: A. M. BERGERE,
[SEAL.] Clerk of Said Court.

The above writ of mandamus is allowed against the Denver & Rio Grande Railroad Company, returnable on the 3rd day of October, 1901, the same to be served by personal delivery thereof to the agent of the said Denver & Rio Grande Railroad Company at its station at Santa Fe, New Mexico, by the agent of relator, L. A. Hughes, who is hereby designated therefor, he to make the return thereof on a true copy of the writ.

JOHN R. McFIE,
Associate Justice and Judge of Said Court.

Witness:
Attest: A. M. BERGERE,
[SEAL.] Clerk of said Court.

And on the same day, to-wit, the 25th day of September, A. D. 1901, there was filed in the office of the clerk of said court, an exhibit marked Exhibit "A" which said Exhibit "A" is in words and figures as follows, to-wit:

Form 3756–8–98–250m.

Original. Shipping Receipt. No. —.

The Denver & Rio Grande Railroad Co.

SANTA FE STATION, September 7th, 1901.

Received from E. J. McLean & Co., the following freight marked as per margin, which we promise to deliver at the railroad com-

pany's freight station at Denver, Colorado, subject to terms and conditions expressed in bills of lading of the Denver and Rio Grande Railroad Company, notice of the terms of which is hereby admitted.

If desired, this receipt can be exchanged at the local freight office for the usual bill of lading of the Denver & Rio Grande Railroad Company.

It is agreed that the liability of the carrier ceases after the freight is unloaded from the car at —— where it has no agent.

21 Limitation of Valuation Agreement.

In order to secure the rate of —— which is less than the regular rate from —— and in consideration of said rate being granted and agreed upon to apply on the shipment herein described, consisting of the articles described below, consigned by —— to ——, it is hereby agreed that the undersigned, in whose favor this contract is executed, that value of the goods herein described does not exceed —— dollars —— and if the same or any part of them are lost or damaged while in transit, or before delivery is effected to the consignee, and the Denver & Rio Grande Railroad Company, or any other company over whose line said good- may be carried under this contract, shall be legally liable for such loss or damage, the amount of value claimed therefor shall not exceed the sum of —— dollars ——.

Signature, —— ——.

Witness, —— ——.

Consignee, marks and destination.	Articles.	Weight, subject to correction.
"Mc" 610 E. J. McLean & Co. Denver, Colo.	1 bale dry hides (machine comp.)	970

When freight is destined off or beyond the line of the D. & R. G. R. R., agents will be careful to note that the name here inserted is the station at which freight leaves the road.

Received for the railroad.

——, Agent.

22 Pro. No. —.

SANTE FE, NEW MEXICO, Sept. 7th, 1901.

Mess. E. J. McLean, & Co. Santa Fe, New Mex.

GENTLEMEN: Your shipment of one bale dry hides offered for shipment this date, destined beyond the boundary of this Territory remains on our platform subject to your order. The laws of the Territory do not permit of the fo-warding of hides beyond the boundary line without having first secured a certificate of inspection from the cattle sanitary board. Therefore, we are unable to handle the ship-

ment referred to without such certificate. In the absence of this certificate the shipment remains subject to your risk. Will you be kind enough to give the matter prompt attention.

Very truly yours,

T. J. HELM,
Gen'l Ag't D. & R. G. R. R.

On the same day, to-wit, the 25th day of September, A. D. 1901, there was also filed in the office of the clerk of said court an exhibit marked Exhibit "B," which said Exhibit "B," is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO, }
Office of the Secretary. }

Certificate.

I, George H. Wallace, secretary of the Territory of New Mexico, do hereby certify there was filed for record in this office at 10:45 o'clock a. m. on the nineteenth day of March, A. D. 1901, Council bill No. 47, entitled, "An act relative to peddling of meats and for other purposes"

23 And also, that I have compared the following copy of the same, with the original thereof now on file, and declare it to be a correct transcript therefrom and of the whole thereof.

In witness wher-of, I have hereunto set my hand affixed my official seal this first day of April, A. D. 1901.

GEO. H. WALLACE,
[SEAL OF NEW MEXICO.] Secretary of New Mexico.

(10c. revenue stamp.)

Council Bill No. 47.

An Act Relative to Peddling of Meats and for Other Purposes.

Be it enacted by the Legislative Assembly of the Territory of New Mexico:

SECTION 1. Any person or persons hereafter engaging in the business of peddling beef in this Territory, shall first obtain from the authority provided by law for the issue thereof, a peddlar's license to carry on such business, and shall pay therefor the sum of two hundred and fifty dollars, said payment to be made annually in advance, which said license fee when collected, shall be covered into the wild animal bounty fund of the county, wherein said sum shall be paid and collected. This act shall not apply to any person who may sell or otherwise dispose of any beef killed in good faith for his own use and this act is intended only to apply to such persons as make a business of peddling.

SECTION 2. Any person found peddling beef without first having obtained a license provided for in section 1 of this act, shall, upon

conviction, be deemed guilty of a misdemeanor and shall be
24 punished by a fine not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than three months nor more than six months, or, by both such fine and imprisonment and the violation of any of the provisions of this act shall constitute a separate offense for each day that such provisions are violated.

SECTION 3. Hereafter it shall be unlawful for any person, firm or corporation to offer, or for any railroad company, or other common carrier to receive, for the purpose of shipment or transportation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof, a fee or charge of ten cents and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of the purchaser and shipper of the hides, as well as all the brands thereon, which said report shall be preserved by the secretary as a part of the records of his office.

SECTION 4. Any person, firm or corporation, common carrier, railroad company or agent thereof, violating any of the provisions of this act, or refusing to permit the inspection of any hides as herein provided shall upon conviction thereof be deemed guilty of
25 a misdemeanor and shall be fined in any sum not exceeding one thousand dollars for each and every violation of the provisions of this act.

SECTION 5. Section 92 of the compiled laws of 1897 is hereby repealed.

SECTION 6. This act shall take effect and be in force from and after its passage.

J. FRANCISCO CHAVES,
President of the Council.
W. E. MARTIN,
Chief Clerk of the Council.
BENJAMIN M. READ,
Speaker of the House of Representatives.
R. L. BACA,
Chief Clerk of the House of Representatives.

Approved by me this 19th day of March, A. D. 1901.
MIGUEL A. OTERO,
Governor of the Territory of New Mexico.

Filed in the office of the secretary of New Mexico, March 19th 1901, 10:45 a. m.
GEO. H. WALLACE, Secretary.

And thereafter, and on, to-wit, the 3rd day of October, A. D., 1901, there was filed in the office of the clerk of said court, a motion to quash the alternative writ of mandamus heretofore issued, which said motion to quash is in words and figures as follows, to-wit:

In the District Court Sitting in and for the County of Santa Fe.

TERRITORY OF NEW MEXICO *ex Rel.* B. J. McLEAN & Co.
vs.
THE D. & R. G. R. R. Co.

Comes now the defendant, the Denver & Rio Grande Rail-
26 road Company by E. L. Bartlett and Charles A. Spiess, its attorneys, and moves the court to quash the alternative writ of mandamus issued out of the above entitled cause and directed to the defendant for that;

First. Said alternative writ was improvidently awarded.

Second. Said alternative writ was awarded upon insufficient allegations contained in the petition for said alternative writ filed in this cause.

Third. Said petition for said alternative writ by its allegations does not state a cause of action.

Fourth. Said petition for said alternative writ does not contain allegations upon which said alternative writ could lawfully be awarded.

Fifth. A compliance with the command contained in said alternative writ wherein said defendant is directed to receive for shipment the said baled dry hides mentioned and described in said petition would be in violation of the provisions of sections 3 and 4 of chapter 45 of the Session Laws of 1901 of the Territory of New Mexico and subject the defendant to the pains and penalties prescribed therein.

E. L. BARTLETT,
CHAS. A. SPIESS,
Attorneys for Respondent.

And thereafter, and on towit, the 23rd day of November, A. D. 1901, there was filed for record in the office of the clerk of said court, a final judgment, which said final judgment is in words and figures, as follows, towit:

In the District Court Sitting in and for the First Judicial District of the Territory of New Mexico, County of Santa Fe.

THE TERRITORY *ex Rel.* McLEAN & Co.
vs.
THE D. & R. G. R. R. — No. 4315. Mandamus.

27 The above cause coming on to be heard by the court at chambers upon the alternative writ of mandamus heretofore

in this cause and the motion of the respondent to quash the same, and said motion being argued by Hon. Chas. A. Spiess for the respondent and Hon. W. B. Childers and R. C. Gortner for the relator, the same is taken under advisement by the court and the court now being fully advised in the premises hereby sustains the said motion to quash, and it is ordered, adjudged and decreed by the court now here that the said writ is hereby quashed and held for naught and the said cause is dismissed at the costs of the relator to be taxed, and judgment is hereby rendered against the said relator herein, the same to be entered in by the clerk of this court. And it is so ordered.

JOHN R. McFIE,
Associate Justice of the Supreme Court
and Judge of said Court.

And thereafter, and on towit, the 23rd day of November, A. D. 1901, there was filed in the office of the clerk of said court a motion for appeal, which said motion for appeal is in words and figures as follows, towit:

In the District Court, County of Santa Fe, Territory of New Mexico.

TERRITORY OF NEW MEXICO *ex Rel.* E. J. McLEAN & Company, Relators. *vs.* DENVER & RIO GRANDE R'D Co., Respondent.	Motion for Appeal.

Comes now the said plaintiff, by the said relator, and moves the court to grant it an appeal to the supreme court of the Territory of New Mexico from the judgment and decision of the said district court above entitled, as contained in the record in the above
28 entitled cause, wherein final decision and judgment, quashing the writ of mandamus, etc., was made and entered of record on the 23rd day of November, A. D. 1901.

W. B. CHILDERS,
CATRON & GORTNER,
Attorneys for Plaintiff and Relator.

And on the same day, towit, the 23rd day of November, A. D. 1901, there was filed for record in the office of the clerk of said court an order granting appeal, which said order is in words and figures as follows, to-wit:

"Upon reading and filing the motion of plaintiff, by said relator, applying for an appeal in the above entitled cause to the supreme court of the Territory of New Mexico, from the judgment and decision of the said district court, as contained in the record in the above cause, wherein final decision and judgment, quashing the writ of mandamus, etc., was made and entered of record on the 23rd

day of November, 1901, the court being now sufficiently advised in the premises.

It is considered, ordered and adjudged that the said plaintiff, by said relator, be and it hereby is allowed an appeal as moved and prayed to the supreme court of the Territory of New Mexico from the judgment and decision of said district court in the above entitled cause, and it is ordered that the clerk of this court do issue citation to the said respondents in accordance with law.

JOHN R. McFIE,
Associate Justice, etc.

Nov. 23, 1901.

29 It is stipulated and agreed by and between parties to the above entitled cause, by their attorneys, that the foregoing transcript prepared in said cause by the clerk of the district court in and for the county of Santa Fe, contains the entire record of pleas and proceedings in said cause in said district court, necessary to a review thereof on this appeal.

W. B. CHILDERS,
CATRON & GORTNER,
Attorneys for Plaintiff and Relator.
CHAS. A. SPIESS,
EDWARD L. BARTLETT,
Attorneys for Respondent.

30 TERRITORY OF NEW MEXICO, }
County of Santa Fe. }

TERRITORY *ex Rel.* E. J. McLEAN & Co. }
vs. } No. 4315.
THE DENVER & RIO GRANDE R. R. Co. }

I, A. M. Bergere, clerk of the district court of the first judicial district of the Territory of New Mexico, in and for the county of Santa Fe, do hereby cer-fy that the above and foregoing twenty-one pages contains the entire record of pleas and proceedings in said cause and court as the same remain on file and of record in my said office, and as embraced within the foregoing stipulation of counsel.

In witness whereof, I have hereunto set my hand and the seal of said court, at my office in the city of Santa Fe, county and Territory aforesaid, this 6th day of December, A. D. 1901.

[SEAL.] A. M. BERGERE, Clerk.

31 And afterwards, on to wit, on the seventh day of January, A. D., 1902, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors were and are in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1902.

TERRITORY OF NEW MEXICO *ex Rel.* E. J. McLean & Co., Relators, Appellants. vs. THE DENVER & RIO GRANDE RAILROAD Co., Appellee.	No. 934. Appeal from District Court, Santa Fe County.

Assignment of Errors.

Come now the said appellants and show to the court here that in the record, proceedings and decree of the district court in the above entitled cause there are manifest errors, to the prejudice of these appellants, in this, to wit:

1. That the court erred in sustaining the motion of respondent to quash the writ of mandamus in said cause.

2. That the court erred in dismissing the said action.

3. That the court erred in refusing to grant its peremptory writ of mandamus.

4. That the court erred in granting judgment in favor of respondent and in failing to grant judgment in favor of plaintiff and relator.

5. That the court erred in many and divers other respects apparent on the record.

Wherefore the said appellants pray that said record may
32 be seen and examined by this honorable court; that the errors of said district court may be corrected, its judgment annulled, and that these appellants may be restored to all things which they have lost by reason thereof.

W. B. CHILDERS,
CATRON & GORTNER,
Attorneys for Appellants.

And afterwards, on to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, A. D. 1902, on the seventeenth day of the said regular term, the same being the 27th day of January, A. D. 1902, the following among other proceedings were had and entered of record, to wit:

THE TERRITORY OF NEW MEXICO *ex Rel.* E. J. McLean & Co., Appellants. vs. DENVER & RIO GRANDE R. R. Co., Appellee.	No. 934. Appeal from District Court, Santa Fe County.

This cause coming on to be heard upon the transcript of record, assignment of errors and brief of counsel is argued by W. B. Childers,

Esq., for appellants, and C. A. Spiess, Esq., for appellees, and argument not being concluded, it is ordered that this cause be, and the same hereby is continued until tomorrow morning at ten o'clock a. m.

And afterwards, on to wit, on the eighteenth day of the said regular term, the same being the twenty-eighth day of January, A. D. 1902, the following among other proceedings were had and entered of record, to wit:

33 TERRITORY OF NEW MEXICO *ex Rel.* E. J. McLean & Company, Appellants, vs. THE DENVER & RIO GRANDE R. R. Co., Appellee. | No. 934. Appeal from District Court, Santa Fe County.

This cause again coming on to be heard upon the transcript of record, assignment of errors and briefs of counsel, and argument not yet being concluded, is again argued by C. A. Spiess, Esq. for appellee and R. C. Gortner Esq., for appellants, and submitted to the court and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government on the first Wednesday after the first Monday in January, A. D., 1904, on the twelfth day of the said regular term, the same being the twenty-first day of January A. D., 1904, the following among other proceedings were had and entered of record as follows, to wit:—

TERRITORY OF NEW MEXICO *ex Rel.* E. J. McLean & Company, Appellants, vs. THE DENVER & RIO GRANDE R. R. Co., Appellee. | No. 934. Appeal from District Court, Santa Fe County.

This cause again coming on for rehearing, the rehearing herein having been heretofore ordered by the court, and coming on to be heard upon the transcript of record, assignment of errors and briefs of counsel, is argued by R. C. Gortner Esq. and William R. Childers Esq. for appellants, and C. A. Spiess, Esq. for appellees, and submitted to the court and the court not being sufficiently advised in the premises, takes the same under advisement.

34 And afterwards, on to wit, at the said regular term of the supreme court of the Territory of New Mexico, on the twenty-second day thereof, the same being Saturday, September third A. D. 1904, the following among other proceedings were had and entered of record, as follows, to wit:—

TERRITORY OF NEW MEXICO *ex Rel.* E. J. McLean & Company, Appellants, *vs.* THE DENVER & RIO GRANDE R. R. Co., Appellee.	No. 934. Appeal from District Court, Santa Fe County.

This cause having been ordered re-argued, by the court, and again coming on to be heard upon the transcript of record, assignment of errors, and briefs of counsel, is submitted by counsel upon briefs, and the parties herein, are granted leave to file additional briefs if they so desire, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, at the said regular term of the supreme court of the Territory of New Mexico, on the twenty-fifth day thereof, the same being the 14th day of September, A. D., 1904 the following among other proceedings were had and entered of record, as follows to wit:—

TERRITORY OF NEW MEXICO *ex Rel.* E. J. McLean & Company, Appellants, *vs.* THE DENVER & RIO GRANDE R. R. Co., Appellee.	No. 934. Appeal from District Court, Santa Fe County.

This cause having been argued by counsel and submitted to and taken under advisement by the court at a previous day of the
35 present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Parker, Chief Justice Mills, and Associate Justice Pope concurring, Associate Justice Baker, dissenting, affirming the judgment of the court below, for reasons stated in the opinion of the court on file; it is therefore considered and adjudged by the court that the judgment of the district court in and for the county of Santa Fe, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, it is considered by the court that the said writ is hereby quashed and held for naught and the said cause is dismissed at the cost of appellants to be taxed, and that judgment is hereby rendered against the said appellants herein.

And afterwards, on to wit: *on* the twentieth day of January, A. D., 1905, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a motion by appellants praying an appeal to the Supreme Court of the United States, which said motion was and is in words and figures, following to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1905.

THE TERRITORY OF NEW MEXICO *ex Rel.* E. J. McLean & Company, Appellants, vs. THE DENVER & RIO GRANDE R. R. Co., Appellee.	No. 934. Appeal from District Court, Santa Fe County.

Motion for Appeal.

Now come the appellants herein, and move this court, to be granted an appeal from the judgment and decree of this court
36 as the same is entered of record, in the above entitled cause to the Supreme Court of the United States.

CATRON & GORTNER,
W. B. CHILDERS,
Attorneys for Appellants.

And afterwards, on to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government on the first Wednesday after the first Monday in January, A. D., 1905, on the thirteenth day of the said regular term, the same being the twentieth day of January A. D., 1905, the following among other proceedings were had and entered of record viz:—

THE TERRITORY OF NEW MEXICO *ex Rel.* E. J. McLean and Company, Appellants, vs. THE DENVER & RIO GRANDE R. R. Co., Appellee.	No. 934. Appeal from District Court, Santa Fe County.

This cause coming on to be heard upon the motion of appellants herein, praying this court for an appeal from the judgment and decree of this court to the Supreme Court of the United States, and the court being sufficiently advised in the premises, grants the same. It is therefore considered and adjudged by the court that the said appellants in the above entitled cause, do have an appeal from the judgment and decree of this court, to the Supreme Court of the United States.

And afterwards, on to wit, on the fourteenth day of September, A. D., 1904, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, the opinion of the court in the above entitled cause, which said opinion of the court was
37 and is in words and figures, following to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1904.

THE TERRITORY OF NEW MEXICO *ex Rel.* E. J. McLean & Company, Appellants,
vs.
THE DENVER & RIO GRANDE R. R. Co., Appellee.

No. 934. Appeal from District Court, Sante Fe County.

Syllabus.

1. The only limitation requiring uniformity of taxation in the Territories is containes in the fourteenth amendment of the Federal Constitution guarantying equal protection of laws, which is satisfied by a tax imposed on a part of the community based on a reasonable and just classification of taxpayers.
2. Laws 1901 p. 96, c. 45, requiring hides of animals killed at slaughter houses to be kept for 30 days free to the inspection of the cattle sanitary board, but nowhere requiring any person to visit any place for the purpose of inspecting hides except once every 30 days, for which a charge of ten cents a hide is required to be paid by the owner, was not an exercise of the general taxing power of the Territory, since it did not attempt to levy a tax on the hides of animals in general killed within the State, but of the police power.
3. Laws 1901 p. 96 c. 45, sec. 6, prohibiting the transportation beyon*f* the limits of the Territory of any hides not inspected and tagged, for which a fee of 10 cents a hide was permitted, was not objectionable, as a violation of the Federal Constitution. art. 1. sec. 10, prohibiting any State, without the consent of Congress, to lay duties on exports, in so fas as it applied to the shipment of hides within the United States.
4. Const. U. S. a-t. 1 sec. 10 providing that no State shall, without the consent of Congress, lay any duties on imports or exports,
38 except what may be necessary for executing its inspection law, and containing provisions for the payment of fees for carrying the same into effect, is applicable to interstate commerce.
5. Laws 1901, p. 96 c. 45, providing for the inspection of hides, permitting a fee of 10 cents a hide to be charged therefor against the owner, and prohibiting any railroad company from shipping hides not inspected and tagged beyond the limits of the Territory, was valid as an inspection law, though its purpose was not to improve the quality of the hides, etc., but was for the sole purpose of aiding in the detection and punishment of crime or fraud against the cattle industry.
6. Since a part of the fees collected for the inspection of hides fixed by Laws 1901, p. 96, c. 45 sections 3 and 4 are applicable to the payment of expenses incurred by the cattle sanitary board

as provided by Comp. Laws, sec. 220, and the secretary of such board has various other duties to perform than those pertaining to the business of inspecting hides, a showing that the cost of such inspection was much less than the amount authorized to be charged by section 3, was insufficient to establish the invalidity of the statute on the ground that the fees provided were beyond the requirements of inspection.

7. Laws 1901, p. 96, c. 45 sections 3, 4, providing for the inspection of hides, and authorizing a charge of 10 cents a hide against the owner for such inspection, do not apply to pelts and skins.

39 Opinion of the Court.

PARKER, J.:

On the 7th day of September, A. D. 1901, Levi A. Hughes, agent of E. J. McLean & Company, of Denver, Colorado, offered for shipment over the defendant company's railroad, one bale of dry hides, weighing 970 pounds, and containing 29 steer hides and 17 cow hides, consigned to E. J. McLean & Company, Denver, Colorado, and delivered same upon the depot platform of said railroad company, at Santa Fe, New Mexico, for transportation from Santa Fe to Denver. T. J. Helm, general agent of said railroad company *action* for the company, declined to receive or transport the hides, outside of the limits of the Territory for want of evidence that the hides offered for shipment had been inspected as required by the laws of New Mexico. That the hides in question had not been inspected as required by section- three and four of chapter 45 of the Session Laws of 1901, or inspected under any laws of the Territory, is admitted for the purpose of this case. Relator sued out an alternative writ of mandamus, commanding said railroad company to receive and transport the hides offered, or to show cause why it had not done so. On the return day the defendant railroad company moved to quash the writ for the reason that the petition for the writ did not state a cause of action. Hearing was had upon the petition, writ, and motion to quash, and the writ was quashed and the cause dismissed. Thereupon an appeal was sued out to this court by the relator.

40 It is conceded by counsel that consistent statutes relating to the same subject matter, though enacted at different times, are treated prospectively, and are considered as one act. U. S. *v* Freeman, 3 How. 556; South. Stat. Con., sec. 288/ The first act relating to inspection of hides was passed in 1884, and provided that all butchers should keep a record of all animals slaughter-, and keep the hides and horns of such animals for thirty days after slaughter free to the inspection of all persons, Compiled Laws, section 84, and provided a penalty for failure to keep the record and the hides and horns, section 86, and a penalty for refusal of inspection of the record or hides, section 87. In 1891, all persons were required to keep hides for thirty days for the inspection of any sheriff,

deputy sheriff, or any constable, or any board or inspector, or any officer authorized to inspect hides, section 89, and provided a penalty, section 90. In 1889, amended in 1895, a cattle sanitary board was created, section 183, with power to adopt and enforce quarantine regulations and regulations for the inspection of cattle for sale and slaughter, section 184, and to pay inspectors not to exceed $2.50 per day and their expenses, section 190. In 1891, the cattle sanitary board was authorized and required to make regulations concerning inspection of cattle for shipment, and hides and slaughter-houses, section 208, and there was provided the details of arrangement for inspection of cattle, section 212 and the duties of cattle inspectors were enlarged by providing: "Every slaughter-house in this Territory shall be carefully inspected by some one of the inspectors aforesaid, and all hides found in such slaughter-houses shall be carefully compared with the records of such slaughter-houses, and a report in writing setting forth the number of cattle killed at any such slaughter-house since the last inspection. * * * the names of the persons from whom each of said cattle was bought, the brands and marks upon each hide, and any information that may be obtained touching the violation by the
41 owner of any such slaughter-house, or any other person, of the provisions of an act entitled "An act for the protection of stock and for other purposes", approved April 1, 1884. For the purpose of making the inspection authorized by this act, any inspector employed by the said sanitary board shall have the right to enter in the day or night time any slaughter-house or other place where cattle are killed in this Territory and to carefully examine the same, and all books and records required by law to be kept therein, and to compare the hides found therein with such records", section 213. In 1893 it was provided that the cattle sanitary board might fix fees for the inspection of cattle and hides, section 221 (repealed in 1889), and that such fees shall be paid to the secretary of the board and placed to the credit of the cattle sanitary board, section 222, and shall be used, together with funds realized from taxes levied and assessed or to be levied and assessed upon cattle only, to defray the expenses of the board, section 220. Chapter 44 of the laws of 1899 makes no changes in the law material to the consideration of this case. Chapter 53 of the laws of 1899 provides a fee of three cents for inspection of cattle. Then follows the act complained of, the pertinent provisions whereof are sections three and four of chapter 45, of the laws of 1901, which are as follows:—

"SECTION 3. Hereafter it shall be unlawful for any person, firm or corporation to offer, or for any railroad company, or other common carrier to receive, for the purpose of shipment or transportation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof, a fee or charge of ten cents, and

such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and
42 shall at once forward to the secretary of the cattle sanitary board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of the purchaser and shipper of the hides, as well as all the brands thereon, which said report shall be preserved by the secretary as a part of the records of his office."

"SECTION 4. Any person, firm or corporation, common carrier, railroad company or agent thereof, violating any of the provisions of this act, or refusing to permit the inspection of any hides as herein provided, shall upon conviction thereof, be deemed guilty of a misdemeanor and shall be fined in any sum not exceeding one thousand dollars for each and every violation of the provisions of this act."

Defendant attempts to justify the act in question under the general taxing power of the Territory. If it be true, as contended by defendant, that every hide produced in the Territory of New Mexico is by law subjected to the payment of the tax of ten cents, we can see no constitutional objection to the law. The limitation upon the taxing power as to equality and uniformity of taxation has its foundation in State constitutions. The only limitation in Territories applicable to the question at issue in this case is contained in the 14th amendment to the Constitution of the United States which g-arantees among other things to all persons the equal protection of the laws. This guaranty, it seems, is not quite the exact equivalent of equality and uniformity as uses in State constitutions. Given a reasonable and just classification of tax payers, all that the 14th amendment of the Constitution of the United States guarantees is that all in the class shall be treated alike. Giozza *v.* Tiernan, 148, U. S. 657. If, then, the legislative department of the government of the Territory has determined that the owners of cattle in the Territory of New Mexico ought in justice and in order to bear their just and fair share of the public burdens to pay a tax of ten cents per head upon each animal slaughtered in the Territory, and has so provided by statute, we can see no reason why such legislation must not be upheld. But an examination of every section of the statute relating to the subject under discussion fails to convince us that the legislature has so provided. It is true that every person killing a bovine animal
43 in New Mexico, is required by law to keep the hide for thirty days free to the inspection of the cattle sanitary board, but nowhere can there be found any requirement of law for any inspector or person to visit any place for the purpose of inspection of hides except slaughter-houses. It is provided in the statute that slaughter-houses shall be inspected once every thirty days, and we assume that the inspector is authorized, under section three of the act of 1901, to charge therefor the sum of ten cents. But it is not made his duty to visit and inspect hides in any other place or places

in the Territory. While it is true that the individual is required to keep the hide for thirty days, so as to permit inspection, it is entirely optional, so far as any requirement of law is concerned, with the inspector, as to whether he visits any place except a slaughter-house. It is a matter of common knowledge that large numbers of cattle are killed in this Territory by people not in slaughter-houses, and it cannot be said, therefore, that a tax of ten cents per hide is levied upon each hide in the Territory. No intention, therefore, of the legislature to tax hides of animals killed in places other than slaughter-houses, and not intended for export, can be drawn from the various statutes on the subject.

The power, then, which the legislature has sought to exercise must be attributed, not to the general taxing power, but to the police power; and this brings us to the second and more important point in this case, and that is, whether the act of 1901, taken in connection with all the other legislation upon the same subject, is a valid inspection law. It is urged that this statute is void, by reason of its antagonism to sections 8 and 10 of article — of the Constitution of the United States. In the first place it is to be observed that the facts in this case do not present the situation of a burden being imposed upon commerce with a foreign country. This being so, the burden is not prohibited by section 10 of article 1 of the Constitution. Woodruff *v.* Parham, 8 Wall. (U. S.) 123; Brown *v.* Huston, 144 U. S. 622. This section contains
44 the only grant or reservation in the Constitution of power to the States to enact inspection laws, and has reference only to commerce with a foreign country; but the same reason exists for the power to enact inspection laws applicable to inter-state commerce, and this power is admitted to be possessed by the States. Patapsco Guano Co. *v.* North Carolina Board of Agriculture, 171 U. S., 345, 354, 361; *in re* Redmond 41 Fed. 867, 874. The first objection to this law, treated as a police regulation, is that it fails to meet the requirements of an inspection law at all, as contemplated by the Constitution and interpreted by the courts. Inspection was first defined by Chief Justice Marshal in Gibbons *v.* Ogden, 9 Wheat. 1, 203, as follows: "The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the General Government; all of which can be most advantageously exercised by the States themselves." In Turner *v.* Maryland, 107 U. S., 38, 55, it was said: "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful

merchandise, as it did or did not answer the prescribed requirements." In Foster *v.* New Orleans, 94 U. S. 246, it is said: "The object of such laws is to certify the quantity and value of the articles inspected, whether imports or exports, for the protection of buyers and consumers." In Clintsman *v.* Northrup, 8 Cow. 46, it is said: "The object of those laws is to protect the community, so far as they apply to domestic sales, from frauds and impositions;
45 and in relation to articles designed for exportation, to preserve the character and reputation of the State in foreign markets." It would appear from these definitions that some element of quality, quantity, form, size, weight, etc., of the article inspected, designed for the protection of the consumer of the article or the reputation of the State wherein it originates, has always been deemed essential. However, the Supreme Court, in Voight *v.* Wright, 141 U. S., 63, expressly declines to limit the scope of valid inspection laws, leaving the matter to each case as it may arise. In People *v.* Campaigne Gen. Transatlantique, 107 U. S., 59, 63, it is said: "A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in title." But this statement is to be taken in connection with the facts in that case, and not to announce a principle of universal application. In that case the tax was levied on immigrants, not property, and the law was held unconstitutional for that reason.

Assuming that the only reason or excuse for the law in question, is the fact that it is designed to aid in the detection and punishment of crime or fraud against the cattle industry of the Territory, as is claimed on argument by counsel for relator, the question is whether this is a proper end to be subserved by an inspection law. It is certainly a wide departure from original definitions to include such a law within them. But in Neilson *v.* Garza, 2 Woods (U. S.), 287, Bradley, circuit justice, a case which is often cited, and which has never, so far as we are aware, been criticised, just such a law as the one under consideration was sustained. In that case the complainant resided in Matamoras, Mexico, and was engaged in importing hides from that place to Brownsville, Texas, and thence to New York. He was subjected by the laws of Texas to the payment of an inspection fee of from six to ten cents
46 per hide by the inspector of the county into which the hides were imported, and of which he complained. The section under which the fee was exacted was a part of a general statute requiring all hides and animals domestic or foreign, to be inspected before they could be imported. The court said: "The exporter must obtain the certificate of the inspector, or his deputy, of the county into which the hides were imported, certifying note what things are to be certified the date of the importation, the name of the importer and of the owner, and of the person in charge, name of the place where imported, number of hides and animals imported,

and description of their marks and brands, if any there be, by which they can be identified."

"What is this but inspection? The party is to subject the hides or animals to the examination of the official inspector, that he may note everything about them, serving to their identification, ownership, etc."

"I do not say that such an inspection as this is necessary or expedient; but it is inspection; and at such a place as Brownsville, it may, for aught I know, be necessary police regulation to prevent frauds and clandestine removal and exportation of property belonging to the people of Texas."

It is here unequivocally announced that a police regulation for the ascertainment of the ownership of animals and hides and to prevent frauds or crimes in connection with such property, may properly be enforced by means of an inspection law. The law, so far as it related to domestic hides, was not drawn in question; but evidently it would be held valid for the same reasons assigned as to the foreign hides. It would be as competent to prevent by an inspection system frauds and crimes against property of this kind which had always remained in the state, as to so prevent frauds and crimes against property which had been removed from the State of Mexico and then reimported into the State, because the same neces-ities, by reason of the character of the property, the methods of produc-
47 ing the same, the facilities of committing frauds and crimes against the same, would exist in both cases in nearly or quite the same degree.

We therefore hold that it is competent by an inspection law to enforce a police regulation calculated and suited to prevent frauds and crimes against the cattle industry of the Territory.

Further objection is made by the relator on the ground that the inspection fees are beyond the requirements for inspection. This objection, standing alone, is not well founded. If the amount of money raised by an inspection system proves to be larger than is required for the purpose, it is to be presumed that the legislature will decrease the charge. And so long as the inspection fee is not so much in excess of what appears to be reasonably required for the inspection as to change the character of the act and makes it appear to be an act designed for revenue instead of regulation, the same presents no judicial question. Petapsco Guano Co., *v.* North Carolina Board of Agriculture, 171 U. *D.* 345. But this objection, taken in connection with the further objection by the relator that the fund realized by the inspection provided for by the act, are by law provided to be and are used for purposes other than paying the expenses of inspection, raises a most serious question in the case.

Section 220 of the Compiled Laws provides as follows:—

"In order to provide the necessary moneys for the payment of the expenses incurred by the cattle sanitary board of New Mexico, in the execution of the provisions of an act entitled 'An act in relation to live stock' approved February 14th, 1891, the said board shall have power

to borrow money and to issue negotiable paper therefor; but the indebtedness so created shall not at any time exceed the sum of five thousand dollars, and any indebtedness so created shall be paid out of revenue accruing to the cattle indemnity fund from taxes levied and assessed or to be levied and assessed upon cattle only, and
48 from fees arising from inspection of cattle and hides as hereinafter provided, and not otherwise."

Of course if it be true that no more money is raised by this inspection system than is required to pay the legitimate expenses of such inspection, then no one has been harmed. But, on the other hand, if it be true that more money is raised than is required, and that the surplus is permitted to be applied, by section 220, to the payment of the other expenses of the cattle sanitary board not connected with the inspection, the tax becomes a burden upon interstate commerce and cannot be sustained. In the first place, it is to be noted that section 220 provides that the board shall be supported, from, among other sources, "fees arising from inspection of cattle and hides as hereinafter provided," and it may well be doubted whether this is not a limitation on the diversion of fees for hide inspection to such fees as might have been collected under the provisions of section 221 prior to its repeal, the two sections being a part of the same act. If so, section 220 would not divert any fees collected under the act of 1901 under consideration. But assuming that section 220 does authorize diversion of fees collected under the latter act, the question is whether the allegations of relator are sufficient to question the constitutionality of the act. The allegation on the subject is contained in specification "I" of the writ and is as follows:

"I. That said pretended fee or charge is largely in excess of the amount of fee or charge which might be absolutely necessary for the making of an inspection such as is required by said pretended enactment, it being the fact that hides as aforesaid are gathered for exportation in car load lots, in the said towns of Albuquerque, Santa Fe, and Las Vegas, and that shipments are made from said points about twelve to fifteen times per year, on an average; that at such times there are on hand for shipment large numbers of hides, varying from 1000 to 3000, and that the same can be inspected at the rate of at least 400 per day, before being baled and compressed for shipment as hereinafter stated; that at such rate of inspection
49 the amount of such inspection would be at least forty dollars per day, whereas the fees and compensation of an inspector of the cattle sanitary board are fixed by law at $2.50 per day and necessary expenses, which said expenses could not exceed $5.00 per day in the discharge of his duties."

It thus appears that relator founds his whole objection to the excess of fees upon the fact that an inspector can earn more per day than, by any possibility, his per diem and expenses could cost. It is clearly overlooked, however, that the salary and expenses of an inspector may, and probably do, form a comparatively small proportion of the

cost of inspection. Records must be made, a secretary of the board must be paid, office records must be provided. The relator by the most liberal construction of his pleading cannot be held to have alleged that the fees collected are in excess of the requirements for all of these purposes and they all seem to be clearly legitimate expenses of the inspection.

We take notice of the statutes of the Territory which provide for and authorize the maintenance of the office of secretary of the cattle sanitary board, and that, as such the said officer has various other duties to perform than those which pertain to the business of inspection of hides. But the court is not furnished by the writ in this case with any information as to what proportion the business of attending to the inspection of hides bears to the whole business of the secretary of the board. We cannot see, therefore, from the allegations in the writ that the legitimate expenses of the hide inspection are not equal to the amount of fees collected. It has already been seen that the hearing in this case in the court below was had upon the petition, writ and motion to quash the writ. The motion to quash the writ was the equivalent of a demurrer and, of course, admitted the facts stated in the petition. In determining as a matter of law that the writ failed to state a cause of action, we
50 think the court below committed no —, it no where appearing from the allegations that the fees collected are in excess of the actual requirements for the enforcement of the law.

Further objection is made by relator to the effect that the tax of ten cents is excessive and practically prohibitive, for the reason that the tax of ten cents is in many cases more than the original value of the hide. It will, however, be observed that the word hide alone is used in the act of 1901, and a distinction between hides and pelts and skins is recognized in some of the sections of the statute. This statute has no application to pelts or skins, and these pelts and skins we assume are what is referred to in the petition as being of less value than the charge of ten cents.

Objection is made by relator that the said inspection law is impracticable, in that no provision is therein made to compel an inspector to promptly inspect hides intended for shipment, and that thereby great delays, embarrassment and loss result to the relator. This contention is not argued in the brief, and we will not therefore consider the same at this time.

For the reasons assigned, the judgment of the court below should be affirmed, and it is so ordered.

FRANK W. PARKER,
Associate Justice.

We concur:
WILLIAM J. MILLS, C. J.
WM. H. POPE, A. J.

Benjamin S. Baker, A. J. dissents.

Mann, J. not having heard argument did not participate herein nor did McFie, A. J., having tried the case below.

51 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1904.

TERRITORY OF N. M. *ex Rel.* T. J. McLean & Co., Appellant-, *vs.* D. & R. G. R. R. Co., Appellee. } No. 934. Appeal from District Court, Santa Fe County.

POPE, J. (concurring):

While I do not regard as tenable the position of the appellee, that the hides here involved, were at the time and place named in the writ, not articles of interstate commerce and that they were thus not within the protection afforded by the interstate commerce clause of the Constitution, I am of opinion that the fee imposed was a valid requirement in the exercise of the police power of the Territory and thus not within the prohibition against the regulation of interstate commerce by the States. The right of the Territory in the exercise of its police power, to exact a proper fee for inspection in cases such as this, is pointed out very clearly in the opinion of the court. It is contended by the relator, however, that even in assuming this power the recitals of the writ taken as true upon the motion to quash show the fee imposed to be excessive and also show that the legislature has diverted a portion of the proceeds to purposes foreign to the ends of the inspection, and that the law thus becomes in effect a revenue measure instead of an inspection charge and is void as an improper burden upon interstate commerce. It is upon this particular contention that I desire by this concurring opinion to record a brief review of the authorities.

The charges which inspection laws impose must be such "as nearly defray the expense of executing the inspection" (*In re* Rebman 41 Fed. 875), but to render a law void because of excessiveness of the fee there must be either such excessiveness as "to shock the
52 conscience" (Patsone case, 52 Fed. 690) and to demonstrate that the legislature under the guise of an inspection law was levying a tribute upon interstate commerce, or there must be created by the law imposing the fee some diversion of the funds from the expenses of inspection to other directions, thus evidencing a legislative purpose to misuse the funds. In either case the legislative intent, presumed from the excess in one instance and evidenced by its express language in the second, stamps the law as a mere sham, a creator of revenue under the guise of a statute for inspection. An instance of the first class of law is found in the recent case of Postal Telegraph Co. *v.* Taylor, 192 U. S. 71, where upon a showing that the fee charged for supervision and inspection was twenty times the amount that would be expended for the purpose, the court held that it was impossible by "the widest stretch of imagination" to regard the fee as reasonable and it was declared void as "a mere subterfuge for the purpose of raising revenue."

Instances of the second class are found in Amer. Fert. Co. v. Board of Agriculture (43 Fed. 613) where the legislature appropriated thousands of dollars derived from so called inspection fees to purposes entirely foreign to the expense of such inspection and the statute was declared void; and also *In re* Rebman, 41 Fed. 875, where the law was declared void because "half of the moneys paid for inspection were given to the inspectors and the other *half ordered into the treasury.*" Is this law void under either of these lines of authority? The first which is a question of fact, must be determined by the allegations of the writ, taken as confessed; the second, which is a matter of law, by the wording of the statute. The only allegations of the petition on this subject are found in paragraph "*i*" of the writ, where it is in effect said that "the pretended fee or charge is largely in excess of the amount of fee or charge which *might* be absolutely necessary for the making "of the required inspection, and where the relator goes on further to allege
that under certain circumstances the inspector could make
53 forty dollars per day when his fees and expenses would amount to only five dollars per day. I cannot consider this allegation of what an inspector under the most favorable circumstances *could* make upon a given day as the equivalent of an allegation that the proceeds of the system of hide inspection taken in the aggregate and for a stated period, are in excess of the amount necessary to defray the expenses of that system for such period. Relator's position overlooks the fact that there may be days when the inspector inspects only a few hides instead of 400, and yet with the same expenses and per diem. It overlooks the fact also that the mere expenses and per diem of the inspector is not all that is charg-able against the fees collected. The system provides for blanks to be printed, tags to be furnished, data to be forwarded to the office of the cattle sanitary board, and an office force there employed to enter such data and preserve the same. It will thus be seen that the fact that one or more inspectors *might* upon a given day make forty dollars, when their personal expenses and compensation are much less, is not equivalent to an allegation that the fees charged are in excess of the aggregate cost of such inspection from year to year. As was said in Cherter City v. Telegraph Co., 154 Pa. St. 464 (quoted with approval in Western Union Telegraph Co. v. New Hope 187 U. S. 425), where it was aver-ed in the affidavit of defense that the rates charged were at least five times the amount of the expense envolved in the supervision exercised by the municipality:

"For the purpose of this case, we must treat this averment as true as far as it goes. The difficulty is it does not go far enough. It refers only to the usual ordinary or necessary expenses of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the
duty of the city to see that the poles are safe and properly
54 maintained, and should a citizen be injured in person or property by reason of a neglect of such duty an action might lie

against the city for the consequences of such neglect. It is a mistake therefore to measure the reasonableness of the charge by the amounts actually expended by the city for a particular year, to the particular purpose specified in the affidavit."

Coming now to the second point as to whether there is any legislative mis-appropriation of the funds derived from these inspections the attention of the court has been called by paragraph "*j*" to Compiled Laws, section 220, which it is alleged diverts the funds arising from "the inspection of hides" to the payment of notes issued from time to time to aid in the execution of the provisions of the act approved February 14, 1901. It is alleged that this is a diversion of the funds in question and renders the law void. It would seem that the words "fees arising from inspection of cattle and hides as *hereinafter provided*," as used in section one of chapter 67 of the Laws of 1893, compiled as section 220 refer only to the fees provided for in section 2 and not to fees provided for by the act of 1891, passed eight years later, and in this view of the matter the fees here in question were not by said statute made subject to the payment of the negotiable paper authorized under the Compiled Laws, section 220. But assuming that such fees were directed to be so used, was this a diversion of such fees from their legitimate purpose? The law of February 14, 1891, referred to in section 220, empowers the cattle sanitary board among other things (section 208) to make "all necessary rules and regulations respecting the inspection of hides and slaughter houses of this Territory and for the government of all employés of said sanitary board." It also regulates the duties of inspectors (section 213), and provides for the salary of the secretary and other employees of the board. It thus appears that this act creates fees and expenses which are a legitimate charge against the fees collected under the act of 1901, for, as we have above
55 seen, the inspectors and the secretary of the board constitute an important part of the machinery required for the inspection under that act. Using the money to aid in the execution of the act of 1891, is thus not necessarily a diversion of the funds raised by the act of 1901. As above pointed out there is no sufficient allegation of any excess in the fees chargeable under the act of 1901 over the expenses of inspection, so there is no ground for the assumption that section 220 effects a diversion of the funds. For aught that appears to the contrary, all the funds collected under the law of 1901, are used in paying that portion of the expenses of the board properly chargeable against the inspection provided for by that act. The fact that the funds collected under the act of 1901, are coverred into the general funds of the cattle sanitary board does not affect the case. That was true in the Patapsco case, 52 Fd. 696 and is a mere matter of book-keeping.

I am of opinion that the judgment should be affirmed.

W. H. POPE,
Associate Justice.

56 TERRITORY OF NEW MEXICO, } ss.
Supreme Court, }

I, the undersigned, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing fifty-five pages contain a true, full and complete transcript of the record and proceedings, pleadings and opinion filed in the above entitled cause, which is transmitted to the Supreme Court of the United States, in accordance with an appeal herein granted.

Witness my hand and the seal of the supreme court of the Territory of New Mexico, this the 31st day of January, A. D., 1905.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court, Territory of New Mexico.

Endorsed on cover: File No. 19,681. New Mexico Territory supreme court Term No. 212. The Territory of New Mexico *ex rel.* E. J. McLean & Company, appellants, *vs.* The Denver & Rio Grande Railroad Company. Filed March 24th, 1905. File No. 19,681.

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Clerk.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES

OCTOBER TERM, 1905

THE TERRITORY OF NEW MEXICO, Ex Rel. E. J. McLEAN & COMPANY,
Appellants,
vs.
THE DENVER & RIO GRANDE RAILROAD COMPANY,
Appellee.

No. 18

Appeal from the Supreme Court of New Mexico

BRIEF OF APPELLANTS.

W. B. CHILDERS,
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Evening Citizen Print, Albuquerque, N. M.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1905.

THE TERRITORY OF NEW MEXICO, EX REL. E. J. McLEAN & COMPANY, *Appellants,*

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, *Appellee.*

No. 212.

APPEAL FROM SUPREME COURT OF NEW MEXICO.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

On September 7th, 1901, Mr. L. A. Hughes, as the agent for E. J. McLean & Company, tendered for shipment over the defendant company's railroad, one bale of dry hides weighing 920 pounds, and containing

46 hides, consigned to E. J. McLean, Denver, Colorado. The hides were delivered upon the platform of the defendant's depot at Santa Fe, New Mexico, the freight was tendered, but the defendant's agent declined to export them as consigned because said bale of hides had not been inspected and tagged, and ten cents per hide paid for inspection fees.

Defendant is a common carrier engaged in carrying freight and passengers between points within the Territory of New Mexico and without. It operates a line of railroad from Santa Fe, where said hides were tendered, and Denver, Colorado, the point of destination. The defendant owed a common carrier's duty to take and receive and transport all freight for the public, including these hides, unless it can show some excuse for its refusal to perform said duty. Its excuse was that said hides had not been inspected in accordance with Sections 3 and 4, Chapter 45, Acts of the Territorial Legislative Assembly of 1901. If this act was constitutional, the defendant's excuse was valid; otherwise not. We are only concerned with these two sections of the act in question, and they are as follows:

"Sec. 3. Hereafter it shall be unlawful for any person, firm or corporation to offer, or for any railroad company, or other common carrier to receive, for the purpose of shipment or transportation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the Cattle Sanitary Board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof, a fee or charge of ten cents, and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the Secretary

of the Cattle Sanitary Board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of the purchaser and shipper of the hides, as well as all the brands thereon, which said report shall be preserved by the Secretary as a part of the records of his office.

"Sec. 4. Any person, firm or corporation, common carrier, railroad company or agent thereof, violating any of the provisions of this act or refusing to permit the inspection of any hides as herein provided, shall upon conviction thereof, be deemed guilty of a misdemeanor and shall be fined in any sum not exceeding one thousand dollars for each and every violation of the provisions of this act."

The Appellants have made and filed the following:

ASSIGNMENT OF ERROR.

Now come the appellants in the above entitled cause and show the Court here that in the record, proceedings and decree of the Court below there is manifest error to the prejudice of these appellants, in this, to-wit:

That the Supreme Court of the Territory erred in refusing to reverse the judgment of the District Court for the errors pointed out by the appellants in the assignment of error filed in that Court; said errors committed by the District Court having been assigned and they are repeated here as reasons why the Supreme Court of the Territory should have reversed the judgment of the District Court, and are as follows, to-wit:

1. That the court erred in sustaining the motion of respondent to quash the writ of mandamus in said cause.

2. That the court erred in dismissing the said action.

3. That the court erred in refusing to grant its peremptory writ of mandamus.

4. That the court erred in granting judgment in favor of respondent and in failing to grant judgment in favor of plaintiff and relator,

5. That the court erred in many and divers other respects apparent on the record.

(*See Record, page* 18).

Wherefore said appellants pray that said record may be seen and examined by this Honorable Court; that the said cause may be reversed and the judgment of affirmance by the Supreme Court and the judgment of the lower Court annulled; and that these appellants may be restored to all things which they have lost by reason thereof; and that said cause be remanded, with proper directions to the Court below.

POINTS AND AUTHORITIES.

I.

A REVIEW OF THE LEGISLATION OF NEW MEXICO CONCERNING THE CATTLE SANITARY BOARD, AND ITS VARIOUS FUNCTIONS.

We agree with the theory of law applied by the Supreme Court of New Mexico, in this case, that all legislation upon the subject of hide inspection in New Mexico, and the organization and existence of the Cattle Sanitary Board, should be looked into and construed together with this enactment, so far as the same may appear to be *in pari materia*. We will briefly, therefore, collate the New Mexico statutes bearing upon the subject.

All the statutes touching "hide inspection," directly or indirectly, are the following:

1st. The Act of the Legislative Assembly of 1889, contained in the Compiled Laws of 1897 as Secs. 181 to 206, creating the Cattle Sanitary Board. See preamble, reciting the creation of the Board "For Sanitary Purposes Only."

The preamble is very lengthy and recites the condition of disease being imported into the Territory by the bringing in of cattle and then proceeds:

"And whereas, the fact has become well established that such imported cattle, so as aforesaid communicating such Texas or splenic fever, never show any symptoms of the disease from which the same may be determined by an inspection thereof.

"And whereas, certain other contagious and infectious diseases, and particularly contagious pleuro-pneumonia, have been and are existing an epidemic among the cattle in certain localities within the United States and beyond the limits of said Territory; therefore for sanitary purposes only:

"Be it enacted, etc."

The whole act is too lengthy to quote in full but it empowers the sanitary board to take steps to prevent the introduction of diseased cattle, to employ a surgeon; to provide books of account; and the governor to issue proclamations; punishes the violation of the quarantine laws; authorizes the employment of assistance to aid in the enforcement of the quarantine laws; authorizes the board to make rules and regulations; and authorizes the seizure of cattle and the slaughter of diseased cattle and payment to the owner therefor except in certain cases; provides for the payment of expenses and of employees, etc., out of the fund raised by the act; and for a tax upon all cattle in the Territory.

2nd. The act of Legislative Assembly of 1891, contained in the Compiled Laws of 1897 as Secs. 207 to 219, giving the board certain additional powers. These powers embrace the first refer-

ence in the laws to any inspection of hides.

The act provides that the board may make all necessary rules and regulations prescribed by the act, and also such rules and regulations respecting the inspection of cattle intended for shipment, or to be driven beyond the limits of the Territory; and also respecting the inspection of hides and slaughter houses, and for the government of employees of the board.

Sec. 209 provides for the inspection of brands on cattle shipped or driven out of the Territory, and for the preservation of a record, in the office of the Secretary of the Board, of the results of such inspection, and what the record shall contain.

Sec. 210: Shippers shall hold the cattle at some convenient place for inspection before shipping.

Sec. 211 makes it a misdemeanor for any railroad company to receive for shipment until furnished with a certificate that the cattle have been inspected.

Sec. 212 prescribes duties of the inspectors.

Sec. 213 imposes additional duties on inspectors—among them the inspection of all slaughter houses, and of all hides in slaughter houses, and for a comparison of brands on them with the records kept at the slaughter houses.

Sections 214, 215, 216, 217 and 218 relate to recording of brands by the owners; evidence; giving of false certificates; compensation of secretary; salaries of employees; and penalties for violation of the act.

3rd. The Act of the Legislative Assembly of 1893, contained in the Compiled Laws of 1897 as Secs. 220 to 225, concerning the raising of general funds for the Cattle Sanitary Board, and providing in one section, No. 221, that the board might fix a fee or charge for the inspection of hides inspected under the provisions of the act—i. e.,

hides inspected at slaughter houses.

Sec. 220 expressly provides for the payment of indebtedness created by the board, shall "be paid out of revenue accruing to the Cattle Indemnity Fund for taxes levied and assessed upon cattle only, and from fees arising from inspection of cattle and hides, as hereinafter provided, and not otherwise."

Sec. 221 gives the board the power to fix the fees for the inspection of cattle and hides.

Sec. 222 provides that all inspection fees shall be paid to the Secretary of the Board and shall by him be transmitted to the Territorial Treasurer, to be placed to the credit of the Cattle Indemnity Fund.

4th. The Act of the Legislative Assembly of 1899, contained in ch. 44, p. 94, Session Laws of 1899, requiring persons offering to butchers dressed meat for sale, should exhibit the hide; and the butcher should keep a record of the brands, etc., thereon.

5th. The Act of the Legislative Assembly of 1899, contained in ch. 53, p. 106, Session Laws of 1899, fixing a fee of three cents per head for inspection of cattle, and repealing Sec. 221 C. L. '97 (being from the laws of 1893), which section was the one that permitted the board to charge or fix a fee for inspection of hides inspected at slaughter houses.

6th. The Act of the Legislative Assembly of 1901, being the one requiring an inspection to export hides by railroad or common carrier, with a tagging thereof, and a fee of ten cents. Quoted above in full.

7th. Sections 84 and 85 of the Compiled Laws of 1897 require butchers to give bonds, to keep records of brands, etc., of all animals slaughtered. Prescribes a penalty for failure to comply with the act. Makes the record the butcher is required to keep, open to the inspection of all persons, and

requires the butcher to keep the hide itself for a period of thirty days.

It will be found upon an examination of this legislation, that there is very little upon the subject of the inspection of hides, and that there is in fact no comprehensive or general system of hide inspection in the Territory for hides bought and sold in the local markets. For local purposes, Sections 84 and 89 of the Compiled Laws of 1897 have evidently been deemed sufficient by the Legislature, and it is provided by them that all persons butchering or killing stock or cattle shall keep the hides thirty days after the killing, and *during said time* shall permit any examination that any inspector, sheriff or other officer may desire to make.

To recapitulate this legislation: By the first law, passed in 1889 (C. L. '97, Secs. 181 to 206), the Cattle Sanitary Board was first brought into existence, "for sanitary purposes only," without a reference in said act to any class of inspection, or to hides, or to cattle inspection. By the second law, that of 1891 (C. L. '97, Secs. 207 to 219), there is made the first reference to hides and inspections, as follows:

In Section 208 (C. L. '97), the Board is given power, "in the exercise o fthe duties conferred and prescribed by this act . . . to make rules and regulations respecting the inspection of cattle . . . and *also respecting the inspection of hides and slaughter houses* in this Territory . . ."

In Sec. 213 (C. L. '97): "Every inspector employed by the sanitary board . . . shall in addition to the duties prescribed . . . be an inspector of brands and ear-marks and *also an inspector of hides and slaughter houses under the provisions of this act*, . . . and shall . . . inspect the brands and ear-marks of all cattle

transported or driven out of this Territory . . .; *every slaughter house* in this Territory shall be carefully inspected by some one of the inspectors aforesaid, and all hides found in such *slaughter houses* shall be carefully *compared with the records of such slaughter houses*, and a report in writing setting forth the number of cattle killed at any such slaughter house since the last inspection . . . the names of the persons from whom each of said cattle was bought, the brands and marks upon each hide, and any information that may be obtained touching the violation by the owner of any such slaughter house or any other person of . . . Section 84 (C. L. '97)."

This is all there is in the said legislation (except the act of 1901), relating to inspecting hides. It was provided in 1893 (Secs. 221 C. L. '97), that the Board might fix a fee or charge for inspecting hides; but this section was repealed as shown above, by ch. 53, Laws of 1899. So that, when the law of 1901 under discussion was enacted, there was nothing requiring the inspection of hides as a preliminary to local commerce therein. The only statutes, those above mentioned, confine themselves to an "inspection of hides and slaughter houses," always coupling the two; giving to the Board only power to make rules and regulations relating to *such* inspection "as prescribed in said act"—i. e., in the inspecting of "hides and slaughter houses," which inspection was also shown to be for the sole purpose of comparing the hides at the slaughter house with the records of the slaughter house, and for the purpose of detecting violations of Section 84 C. L. '97. This section is the one that requires the keeping of the hide for thirty days after the killing.

It is plain that these laws prescribe no inspection except that of slaughter house hides, and that for a dis-

tinct purpose.

As was said by the New Mexico Supreme Court, in passing upon this status of the local enactments, in this case (Territory vs. D. & R. G. R. R. Co., 78 Pac. Rep., p. 75):

"If, then, the legislative department of the government of the Territory has determined that the owners of cattle in the Territory of New Mexico ought in justice, and in order to bear their just and fair share of the public burdens, to pay a tax of ten cents per head upon each animal slaughtered in the Territory, and has so provided by statute, we can see no reason why such legislation must not be upheld. But an examination of every section of the statute relating to the subject under discussion fails to convince us that the Legislature has so provided. It is true that every person killing a bovine animal in New Mexico is required by law to keep the hide for thirty days free to the inspection of the Cattle Sanitary Board, but nowhere can there be found any requirement of law for any inspector or person to visit any place for the purpose of inspection of hides except slaughter houses. It is provided in the statute that slaughter houses shall be inspected once every thirty days, and we assume that the inspector is authorized under Section 3, ch. 45, p. 96, of the act of 1901, to charge therefor the sum of 10 cents. But it is not made his duty to visit and inspect hides in any other place or places in the Territory. While it is true that the individual is required to keep the hide for thirty days, so as to permit inspection, it is entirely optional, so far as any requirement of law is concerned, with the inspector, as to whether he visits any place except a slaughter house. It is a matter of common knowledge that large numbers of cattle are killed in this Territory by people not in slaughter houses, and it cannot be said, therefore, that a tax of ten cents per hide is levied upon each hide in the Territory. No intention, therefore, of the Legislature to tax hides of animals killed in places other than slaughter houses,

and not intended for export, can be drawn from the various statutes on the subject."

See Trans. p. 25.

This is the construction of the New Mexico Supreme Court, upon the very laws in question; and it is conclusively fixed that hides, out of a slaughter house, or in a slaughter house after thirty days age, were under no disability as articles of commerce, except for the period of thirty days after the killing. *Expression unius est exclusio alterius*; and the requirement to withhold hides from trafficking for thirty days, qualifies them for commerce and traffic after that time. Hides, therefore being after thirty days' age free articles of commerce in New Mexico, with all power to inspect the same or to charge a fee thereon, or to withhold the same from commerce, absolutely determined, and being free in every sense—the law of 1901, attacked by this proceeding, was passed, taxing their exportation.

Construed in the light of the foregoing, there is very little in the old laws which can be said to be in *pari materia* with the law of 1901, as regards hide inspection. A new, different, and additional inspection and charge is imposed by the law of 1901, on a thing already an article of commerce, when offered for exportation. A hide already "*inspected*," that is, *compared* at a slaughter house, or anywhere else, under the old statutes, must be re-inspected at the port of shipment or exportation. Its old inspection is not the inspection called for by the law of 1901, for exportation purposes; its old inspection gave it no tag, nor could the inspection of a hide in the hands of the killer, in the little Mexican hamlet, or on the range, or even at the slaughter house, give the name of the "shipper"—one of the essentials of the "inspection" under the law of

1901. Hides more than thirty days old can be bartered and sold in the Territory without hindrance. After that time, no inspector can compel a holder of hides to submit them to inspection of any sort, nor can he charge any fee, unless the holder brings them to the port for exportation. The statute of 1901 exclusively provides for an "*exportation inspection;*" and would require the reinspection and tagging of hides even already inspected under the old statutes. The penalty of the law is only that hides shall not be exported until tagged—not that they shall not be trafficked in the local markets.

II.

THE NEW MEXICO STATUTE UNDER CONSIDERATION IS NOT AN "INSPECTION LAW."

The law of 1901 is not an *inspection law* within the meaning of the exception found in the Constitution of the United States, Article I, Sec. 10, paragraph 2, reading as follows:

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . ."

This brings us at once to the inquiry as to what is an inspection law. The District and Supreme Courts of New Mexico have, as we understand it, confused some of the underlying principles applicable to the questions concerned in this case. By them, the police power has, for instance, been coupled with inspection laws. Inspection laws may be an exercise of the police

power, or they may not. No so-called inspection law can be held valid as a proper exercise of the power of States, by calling it the exercise of the police power. It is either an inspection law, or it is not. We analyze the above section as meaning that the state is prohibited from laying any duties on imports or exports, without the consent of Congress; but that, despite this prohibition the state may lay such imports or duties where absolutely necessary for executing its inspection laws. It is also provided in the same section that the net product of all duties and imports laid by any state shall be for the use of the Treasury of the United States.

In Gibbons vs. Ogden, Chief Justice Marshal (9 Wheat., 1), says:

"The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or it may be for domestic use."

In Brown vs. Maryland (12 Wheat., 419), it is said:

"An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is not usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports?' The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports,' then,

is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied ,while the article is entering the country, but extends to a duty levied after it has entered the country . The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is 'except what may be absolutely necessary for executing its inspection laws.' Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act on importations, they are generally executed on articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition of the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition."

The propositions so made, by Chief Justice Marshall, have never been disputed or modified; yet in the trial court in this case the power to levy this duty for inspection purposes was confused with the general power of taxation. It is clear that such a tax as is complained of in the case at bar, cannot be levied unless it clearly comes within the definition of inspection laws, and then only for the amount absolutely necessary for the execution of such laws.

Under the law in question, only hides offered for the purpose of shipment beyond the limits of the Territory are subjected to the "inspection"—and the tax. In the language of Chief Justice Marshall, the duty is levied on the article itself, not on the act of importation or exportation, and can only be justified under the Constitution by bringing it within the exception we are considering . It is plain that the shipper cannot ship

until he has had his hides tagged and paid his fees. It is equally plain that he is not required to do this at all unless he offers the hides to a common carrier for shipment to a point beyond the Territorial boundaries. It is true that the Territorial Courts have, in approaching this matter, discussed it under the interstate commerce clause of the Constitution, and not the inspection clause; but it seems plain that to hold that a commodity cannot be shipped out of the Territory without the payment of a special duty and charge, whether exacted at the warehouse of the shipper, or on the platform, or in the depot, or in the carrier's cars, is unquestionably an interference with commerce between the states, and with the exclusive right of Congress to lay duties on exports. It is to be borne in mind that there is no claim that this inspection charge is a tax levied under the general taxing power of the Territory. These hides were subject to general taxation, and presumably paid taxes like all other property; and the money or other article received for them in exchange would likewise become a part of the general mass of taxable property in the Territory.

We are brought back always to a consideration of the proposition as to whether this is in fact an inspection law, and whether the charges exceed the amount absolutely necessary for its execution.

The Statute of 1901 of New Mexico being shown clearly to be an innovation in the Territory's legislation on the subject, and being in fact the only "inspection law" for the examination of hides, it is interesting to inquire what this alleged inspection does. The data taken by the inspector, under the law, gives "the names of the purchaser and shipper of the hides, as well as all the brands thereon." How this fits the hides for ex-

portation, how it preserves the credit of the Territory, how it protects any person from deceit or fraud as to quality, weight or value of the hides, cannot be seen. By the decision of the New Mexico courts, these matters have all been waived, and it is said that the law is an inspection law, for the detection or prevention of crime, in the cattle industry. We will later discuss the wrong of taxing one article of commerce, or one class of property, for the protection or benefit of another and distinct property or line or enterprise. But we submit, that the statute in question does nothing for the protection of property. In the case at bar, forty-six hides are offered for shipment. "The inspection" to be made would ascertain the name of the relator as shipper, and the name of relator also as consignee, and the various brands appearing on the hides. It would appear by the report that the relator had shipped or exported out of the Territory forty-six hides, branded A., B. and C. It would not appear whence relator obtained them, nor could their title be traced in any way. Remembering that hides are a legitimate article for local commerce; that they pass in the markets, without bill of sale; and even assuming that a hide marked "A" had been stolen from a butcher in some remote part of the Territory, its identity with the one exported could not be established. Assuming that three cattle, branded "B", had been killed by thieves, would the fact that a dry hide of that brand had got into the market, and had been exported by the relator in this case, assist the prosecution of a disconnected crime, in any conceivable way? There is no power in this law to detain a suspected hide, nor to seize one which corresponds in brand with the brand upon another out of a possible thousand, which one may have been stolen. The exportation of

the hide, honest or dishonest though it may be, results immediately from the tagging and taxing by the Cattle Sanitary Board, and, instead of preventing crime, if wrong has been done it is facilitated and assisted by the removal of the property from the Territory under official sanction.

But the prevention and detection of crime has never yet been pointed out by any other court as the legitimate purpose of an inspection law. The court, by Mr. Justice Miller, in 107 U. S., 61, People vs. Compagnie Gen. Transatlantique, says:

"Another section provides for the custody, the support, and the treatment for disease of these persons, and the retransportation of criminals. Are these inspection laws? Is the ascertainment of the guilt of a crime to be made by inspection? In fact, these statutes differ from those heretofore held void only in calling them in their caption 'inspection laws,' and in providing for payment of any surplus, after the support of paupers, criminals, and diseased persons, into the treasury of the United States . . . a surplus which, in this enlarged view of what are the expenses of an inspection law, it is safe to say will never exist. A state cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title."

We emphatically say that a search after evidence by the inspection of a hide is no more the legitimate purpose of an inspection law than the examination of the possible thief would be. We will show before we conclude that its principal object is to collect a revenue to defray the expenses of the Cattle Sanitary Board, and is a tax levied on one class of property and citizens engaged in one line of business, for a questionable and vague benefit to the property of another class.

In Leisy vs. Hardin, 135 U. S., 112, there is contained an approval of the early definition of Chief Justice Marshall, as to what is properly an inspection law. Quoting from Bowman vs. Chgo. Ry. Co., 125 U. S., 465, the court says:

"'If, in the present case,' said Mr. Justice Matthews, 'the law of Iowa operated on all merchandise sought to be brought from another state into its limits, there could be no doubt that it would be a regulation of commerce among the states,' and he concludes that this must be so, though it applied only to one class of articles of a particular kind. The legislation of Congress on the subject of interstate commerce by means of railroads, designed to remove trammels upon transportation between different states, and upon the subject of transportation of passengers and merchandise, including the transportation of nitro-glycerine and other similar explosive substances, . . . is referred to as indicative of the intention of Congress that the transportation of commodities between the states shall be free, except where it is positively restricted by Congress itself, or by states in particular cases by express permission of Congress. It is said that the law in question was not an inspection law, the object of which is 'to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use; Gibbons vs. Ogden, 9 Wheat., 1; Turner vs. Maryland, 107 U. S., 38, 55); nor could it be regarded as a regulation of quarantine, or a sanitary provision for the purpose of protecting the physical health of a community; nor a law to prevent the introduction into the state of diseases, contagious, infectious or otherwise. Articles in such a condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered a regulation of commerce, prohibited by the Constitution; and the observations of Mr. Justice Cat-

ron, in The License Cases, 5 How., 504, 599, are quoted to the effect that what does not belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the state to bring within the police power 'any article of consumption that a state might wish to exclude.'"

In Burnill's Law Dictionary, "Inspection" is defined thus:

"Official view or examination of commodities or manufactures to ascertain their quality, under some statute requiring it."

In Bouvier's Law Dictionary, this is the definition:

"The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce."

In Clintsman vs. Northrop, 8 Cow., (N. Y.) 45, the inspection laws of New York are said to be laws "to protect the community, so far as they apply to domestic sales, from fraud and impositions, and, in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets.

See 16 Am. & Eng. Ency. Law, 808, and note.

"It does not at all follow that every (state) statute, enacted ostensibly for the promotion of (certain) ends, is to be accepted as a legitimate exertion of the police powers of a state. There are, of necessity, limits beyond which (state) legislation cannot rightfully go. The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry, whether the legislature has transcended the limits of its authority. If therefore a statute purporting to have been enacted to protect the public health, the public

morals, or the public safety has no real substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

"It is equally true, however, that inspection laws, to be within the sovereign prerogative of the state, and to stand superior to cardinal provisions of the national Constitution, must be essentially and really such in character, purpose and operation. To call a law an inspection law does not make it one, competent to override any tenet of Constitutional law. It must be an inspection law in spirit and in truth, in order that its character as such shall be respected; and even though it be, in its essence and design, an inspection law, yet, in order that it may not be subordinated to the provisions of the Constitution establishing the freedom of interstate commerce, it must be a 'reasonable law,' properly devised for preventing the evil at which it is aimed; so devised as to no more than effectuate that purpose, and as not to subserve other objects unessential to the public safety. When inspection laws are abused for the latter ends, and thereby affect foreign commerce and trade between the states, it is competent for the national courts—it is made our solemn duty—to pronounce them invalid and to forbid their enforcement.

"And so, it seems to me, the question at bar is resolved into the inquiry whether or not the meat inspection law of Virginia is reasonable and necessary, is directed against a dangerous evil, has an eye single to the prevention of that evil, and provides for the prevention in a manner less injurious to the Constitutional rights of citizens of our sister states than any other that could be devised. The first inquiry is, whether this law was necessary to the public health and safety. Surely no public emergency, no prevalent epidemic, no general danger, or popular apprehension of danger existed to render a law 'absolutely necessary' or at all necessary, such as has never before been passed in the

history of the commonwealth. The law does not purport on its face to have been necessary to public safety; and I am of the opinion that it was not so. But even if it were, is it 'reasonable' in its provisions?"

Mugler vs. Kansas 124, *U. S.* 623.

Does any general danger, any popular apprehension of danger, from the stealing of hides, appear in New Mexico? Clearly not, for there is no vigilant inspection law, for the tracing of hides intended for local commerce, local tanneries, or local manufacture. The exercise of police power, for the detection of crime, is only thought necessary when exportation, or commerce between the states, is set in motion. As stated before, this is purely an exportation charge, purely an exportation inspection, an inspection for the taking of the shipper's name—and there can be no shipper within the meaning of this law of 1901, without an offer for extra Territorial shipment; and this "inspection" must be made in addition to any that may have been made under the previous laws, when the hide is offered for export. A hide thirty days old, is exempt from inspection when sold in the Territory; but, even though already inspected, it has to undergo another inspection, when offered for export.

"Of course, they cannot be taxed as exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any state, without the consent of Congress, from laying any imposts or duties on imports or exports; and although it has been decided, in Woodruff vs. Parham, 8 Wall., 123, that this clause relates to imports from and exports to foreign countries, yet when such imposts or duties are laid on imports or exports from one state to another, it cannot be doubted that such an

imposition would be a regulation of commerce among the states, and therefore be void as an invasion of the exclusive power of Congress."

Coe vs. Errol, 116 *U. S.,* 525.

"There is another view on this subject however, independent of the considerations which governed our former decision, which is equally decisive of this case. We have lately decided, in Coe vs. Errol, 116 U. S., 517, that goods intended for exportation to another state are liable to taxation as part of the general mass of property of the state of their origin, until actually started in the course of transportation to the state of their destination, or delivered to a common carrier for that purpose, *provided they are taxed in the usual way in which such property is taxed, and not taxed by reason or because of such exportation or intended exportation,* and that the carrying of them to and depositing them at a depot for the purpose of transportation is no part of that transportation. Now the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a state. In the one case the words are, 'No tax or duty shall be laid on articles exported from any state.' Art. I, Sec. 9, par. 5. In the other they are, 'No state shall, without the consent of Congress, lay any imposts or duties on imports or exports.' Art. I, Sec. 10, par. 2. The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their exportation, is not within the constitutional prohibition."

Turpin vs. Burgess, 117 *U. S.* 506.

The two cases last cited have been distinctly followed in the recent case of Cornell vs. Coyne, 192 U. S., 426. In this case, the court says:

"The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation."

The holding of the court in this case is to the effect that property or goods manufactured with the intention of exporting the same cannot, by such intention, be exempted from the *ordinary burdens* of taxation applicable to all like property in the state. The cases above quoted are approved, wherein the principle is laid down absolutely that articles cannot be specially taxed, simply by reason of, or because of, their intended exportation. That is precisely what the law of New Mexico of 1901, does. It undertakes to enforce an examination, called an inspection, with a tax of 10 cents incidental thereto, at the port of shipment, only upon hides offered for export beyond the limits of the Territory. It is said that this is to detect crime; yet no similar efforts to detect crime are made by the law upon hides designed for local commerce. It is suggested in the opinion of the New Mexico Supreme Court in this case that in inspecting slaughter houses under the older statutes, the inspector might follow this law of 1901 and charge the fee of 10 cents. But in this the court was clearly under a misapprehension. The inspection of 1901 requires the taking of data which can only exist at the port of shipment—the name of the shipper. A hide reposing in a slaughter house could not be inspected, so as to reveal the name of a shipper, nor could the inspection fee be there earned, because it would have no shipper within the meaning of the law of 1901 until brought to a common carrier, and offered for con-

signment to some point outside the Territory of New Mexico. But even if slaughter house hides are chargeable with this tax, it is recognized by the Supreme Court of New Mexico, in its opinion, "That large numbers of cattle are killed in this Territory by people not in slaughter houses, and it cannot be said, therefore, that a tax of 10 cents per hide is levied upon each hide in the Territory." It is, therefore, apparent that this 10 cent tax is an unusual tax not levied upon all property in the same class, but levied only on that portion of the hides of New Mexico which are offered for exportation by a common carrier; and although the law does not say, on its face, that it is taxing these hides simply because of their exportation, still it is apparent that that is the only purpose or reason for the taxation. It cannot be said that the object is to detect crime, when the Legislature discriminates in favor of local commerce and shows no disposition to detect crime at the expense of local industry.

The case of Turner vs. Maryland, 107 U. S., page 38, was much relied upon by opposing counsel, to establish the proposition advanced by them, that a state can arbitrarily destroy an article produced within its borders, and deprive it of becoming the subject of commerce, by the enactment of inspection laws. The object of the Maryland Statute plainly was to give an inspection which would benefit the article inspected, and which would give to the packages of tobacco a certificate by the state as to their character, quality and weight. An inspection fee was charged for this classification. It is submitted that this case would have been entirely different in its theories and result, if, for instance, a fee had been charged by the state, for looking over the tobacco, without certifying or classifying it in any way,

for the purpose of determining whether or not any evidence could be found therein, to assist in the prosecution of offenses against some entirely different kind of property. It is also apparent in the case of Turner vs. Maryland, that the inspection fee charged was not levied because of the intended exportation of the tobacco, but because of the benefit done to the tobacco in the markets of the country by having the state certify to its quality and class. There is no parallel for this in the New Mexico law. The tag attached by the hide inspector certifies nothing, as to weight, quality or security of title. It simply shows that the hide has paid the exportation tax into the funds of the Cattle Sanitary Board. The Maryland law was essentially a law drawn for the purpose of inspection; the New Mexico law has no features in common with it, and cannot be classified as an inspection law along with that in the Maryland case. In this case, the court said:

"The contention of the plaintiff in error is, that a law which otherwise would be an inspection law ceases to be such if no provision is made for opening the package containing the article and examining the quality of its contents. On this subject the Maryland court held that, in order to constitute an inspection law, an examination of the quality of the article itself is not necessary; but that to prepare the products of a state for exportation, it may be necessary that such products should be put in packages of a certain form, and of certain prescribed dimensions, either on account of the nature and character of such products, or to enable the state to identify the products of its own growth, and to furnish the evidence of such identification in the markets to which they are exported. In opposition to these views, which appear to us to be sound, we are asked to hold that the provisions under consideration do not fall under the head of inspection laws, in a case where the question is presented, without the finding of

any facts, to show what may be thus necessary in regard to a product is not necessary in regard to tobacco, and with every presumption to the contrary, arising out of the course of legislation as to the inspection of tobacco, by the state of Maryland. The Legislature of the State of Maryland from the earliest history of the colony, and since the formation of the State Government, has made the inspection of tobacco raised in that state compulsory. That inspection has included many features, and has extended to the form, size and weight of the packages containing the tobacco as well as to the quality of the article. Fixing the identity and weight of tobacco alleged to have been grown in the state, and thus preserving the reputation of the article, in markets outside of the state, is a legitimate part of inspection laws, and the means prescribed therefor in the statutes in question, naturally conduce to that end. Such provisions as parts of inspection laws, are as proper as provisions for inspecting quality; and it cannot be said that the absence of the latter provisions, in respect to any particular class of tobacco, necessarily causes the laws containing the former provisions to cease to be inspection laws. It is easy to see that the use of the precaution of weighing and marking the weight on the hogshead and recording it in a book, is to enable it to be determined at any time whether the contents have been diminished subsequently to the original packing, by comparing a new weight with the original marked weight, or if the marked weight be altered, with the weight entered in the warehouse book. The things required to be done in respect to the hogshead of tobacco, in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead as a unit, containing the tobacco, for exportation, and for becoming an article of foreign commerce, or commerce among the states, and are to be done before it becomes such an article. They are properly parts of inspection laws, within the definition given by this court in Gibbons vs. Ogden, 9 Wheat., 1."

This is a leading case on this subject and if there

can be pointed out one single function performed by the New Mexico Statute, which is like the Maryland law, we shall be glad to see it. As a matter of fact, the New Mexico law is not an "inspection law," within the meaning of that term as recognized by any court.

III.

THE NEW MEXICO STATUTE IN QUESTION UNDERTAKES TO IMPOSE A TAX, CHARGE AND DUTY UPON ONE CLASS OF PROPERTY AND UPON ONE LINE OF INDUSTRY, FOR THE SOLE PURPOSE OF PROTECTING ANOTHER CLASS OF PROPERTY AND A DISTINCT AND DIFFERENT LINE OF INDUSTRY.

To impose a discriminating and special tax on the property of one class of citizens, as upon butchers, or hide dealers, or upon one kind of property, as upon hides, to protect the property of another class of citizens, as cattle raisers, or another kind of property, as cattle, is in violation of fundamental principles of government, and natural right.

It takes private property for private use without compensation. It deprives the despoiled citizen of the equal protection of the laws.

" 'It may well be doubted,' said Chief Justice Marshal, in Fletcher vs. Peck, 'whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question whether the transferring

of the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection. It is the particular province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society; would seem to be the duty of other departments.' And Chief Justice Chase adds, with great force: 'And if the property of an individual cannot be transferred to the public, how much less to another individual?'

"'It violates that fundamental principle of all just legislation, that the legislatures shall not take the property of A and give it to B.'

"'No court for instance,' said the late Justice Miller, in Loan Association vs. Topeka, 'would hesitate to declare void a statute which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. Of all the power conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited.' And then follow these weighty words: 'To lay with one hand the power of government on the property of the citizen, and with the other bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation.'

He then quotes the language of Judge Cooley: 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.'

"Judge Cooley says: 'Levies for Private Purposes —Where, however, a tax is avowedly laid for a private purpose, it is illegal and void. The following are illustrations of taxes for private purposes: A tax levied to aid private parties or corporations, to establish themselves in business as manufacturers; a tax the proceeds of which are loaned out to individuals who have suqered from a great fire; a tax to supply with provi-

sions and seed such farmers as have lost their crops; a tax to build a dam which, at discretion, is to be devoted to private purposes; a tax to refund moneys to individuals which they have paid to relieve themselves from an impending military draft; and so on. In any of these cases the public may be incidentally benefited, but the incidental benefit is only such as the public might receive from the industry and enterprise of individuals in their own affairs, and will not support exactions under the name of taxation.'"

1 *Tucker on the Constitution*, 77.

To this proposition we further quote: "Of all the powers conferred on government that of taxation is most liable to [illegible]. The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of people. It was said by Chief Justice Marshal, in the case of McCollough vs. the State of Maryland, "That the power to tax is the power to destroy." Loan Ass. vs. Topeka, 20 Wall 665.

Tested by these principles, even if the ten cents tribute per hide exacted by law was all expended in the protection of the cattle in the Territory against theft, which is not the case, upon what theory can it be justified?

To protect property against loss by fire is undoubtedly a proper exercise of the police power. To tax my property for the purpose of insuring my neighbors, or to remove inflammable material which might set fire to my neighbor's house, is not a proper exercise of the powers of government. To tax residences, to detect, apprehend and punish the incendiary of railroad property, is not a proper exercise of either the police power, or the power of general taxation. Nor is the principle at all changed by levying a tax on one class of property

for the benefit of another class. The court below seems to have concluded that the police power being as broad and plenary as the taxing power, and as the taxing power was all pervading, any act the legislature might pass could be justified. As we have already shown, Congress excepted taxes which operate as export duties on interstate commerce from both the general power of taxation and the police power, unless within the proper scope of inspection laws.

Again we repeat, these so-called inspection fees are not exacted under the general taxing power. It is under the police power, and the Constitution prohibits such an exercise of the police power, unless authorized by the exception in the Constitution.

IV.

THE NEW MEXICO STATUTE IN QUESTION IS NOT A REASONABLE LAW, PROPERLY DEVISED FOR PREVENTING THE EVIL AT WHICH IT MAY BE AIMED, IF IT IS AIMED AT ANY EVIL; AND NOT SO DEVISED AS TO NO MORE THAN EFFECTUATE THAT PURPOSE.

As stated in the Mugler case, 123 U. S., 623, to be valid as an inspection law, "It must be a reasonable law, properly devised for preventing the evil at which it is aimed; so devised as to no more than effectuate that purpose, and as not to subserve other objects unessential to the public safety." It is respectfully submitted that the law of New Mexico, under discussion in this case, bears no reasonable connection with the detection of crime, nor with any usual purpose of inspection laws;

and that it is furthermore unreasonable and unfair in its operation, and in its discrimination against and imposing difficulties upon interstate commerce, making no similar restrictions upon local commerce.

"To justify a state in thus interposing its authority in behalf of the public, it must appear, first, that the interest of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

From the opinion of the court, by Mr. Justice Brown, in Lawton vs. Steele, 152 ,U. S., 137

Quoting from

Henderson vs. New York, 92 *U. S.*, 259.

Railroad Co. vs. Husen, 95 *U. S.*, 465.

Chy Lung vs. Freeman, 92 *U. S.*, 275, with other citations.

Also:

"In all these cases (the court says) the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical prohibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests."

In Lake Shore & M. S. Rd. Co. vs. Ohio, 173, U. S., 300, the court says:

"In what has been said we have assumed that the statute is not in itself unreasonable; that is, it has appropriate relation to the public convenience, does not

go beyond the necessities of the case, and is not directed against interstate commerce. In Railroad Co. vs. Husen, 95 U. S., 465, reference was made to some decisions of state courts in relation to statutes prohibiting the introduction into a state of cattle having infectious disease, and in which it was contended that it was for the legislature and not for the courts to determine whether such legislation went beyond the danger to be apprehended and was therefore something more than the exertion of the police power. This court said that it could not concur in that view; that as the police power of a state cannot obstruct either foreign or interstate commerce 'beyond the necessity for its exercise,' it was the duty of the courts to guard vigilantly against 'needless intrusion' upon the field committed by the Constitution to Congress. As the cases above cited show, and as appears from other cases the reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court, whether such legislation encroaches upon national authority or is to be deemed a legitimate exertion of the power of the state to protect the public.

(Railroad Co. vs. Husen, 95 U. S., 465, so often cited:)

"While we unhesitatingly admit that a state may pass laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into and through the state, beyond what is absolutely necessary for its self-protection. The police power of a state cannot obstruct foreign or interstate commerce beyond the necessity for its exercise; and as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

The conditions of trade under which interstate commerce is transacted in this particular industry are

matters which cannot be ignored by legislatures in dealing with established customs and industries. When the legislature of New Mexico sought to levy a tax, enforcible in an unusual way upon an honest and legitimate article of commerce, at a particular time, namely when that article was offered for consignment beyond the limits of the Territory, it is important, in determining the validity and good faith of that law to determine whether or not it was reasonable, both in its language and in its operation, and to determine, secondly, whether it was reasonably capable, under the fixed conditions of said trade, and the necessary conditions to the existence of said trade, of accomplishing the legitimate and usual ends of the class of laws known as "inspection laws."

The writ of mandamus, with all the allegations therein, is taken as confessed in this proceeding and the court's attention is particularly called to the following six paragraphs of fact alleged in said writ, and admitted as true:

"k. That the said pretended inspection is impossible of execution under the established customs and usage of interstate trade in hides, for the reason that at the time when said hides are offered for shipment and the necessity for inspection under the said act attaches, the said hides are (by the customs of trade and in order to secure advantageous freight rates, so that the said commerce may be carried on and the hides of New Mexico may be marketed in the markets of the world on equal terms with the hides of other portions of the United States of America), first compressed by machinery into a hard and compact mass, getting the greatest possible weight into the smallest possible compass, and then bound and baled by wire, in such compressor, in bales containing from thirty to one hundred and fifty hides, and so offered for shipment, the intent

being to get the greatest possible number of hides into a car such as is commonly used by railroad companies, and such course being necessary by reason of the close competition in hides throughout the said United States and the necessity for economy in their shipment and marketing, in modern business methods, and such compression of hides being practiced by all shippers throughout the country, in order so to compete in marketing the same; that by the terms of said statute, it is thereupon attempted to impose upon the railroad company or common carrier, by criminal responsibility, the duty of examining minutely each hide which has been so packed, baled and wired as preliminary to its offer for shipment, to ascertain whether or not each of such hides bears an inspection tag, no provision being made by said law for the tagging of any bale of hides, nor for the issuance of any certificate of inspection thereon; that, to comply with the said statute, the customs and methods of trading and exporting hides would be utterly destroyed and ruined, in the opening by said railroad company or common carrier of such bales, thereby releasing compression thereon and necessitating another compression of said hides for shipment, at the warehouses of said relator, and a rebaling of the same for shipment; whereupon, it would again be impossible for the said common carrier to know whether or not the hides contained in said package, so rebaled, were tagged or inspected or not, though such common carrier would again be held to criminal responsibility in the premises.

"l. That the larger portion of the hides produced in New Mexico and Arizona and by said relator stored in New Mexico and shipped, at advisable times to the general hide markets of the country, are marketed in the cities of Chicago, New York and Boston; that the proximity of manufactories for the working of leather, and tanneries for the tanning of the same, and forests producing bark for the making of tannic acid, necessary in the working of such hides into leather, have established these three cities as the centers of commerce in hides in the United States of America; that the market

value and price of hides in said cities fluctuates, as does that of any other general commodity produced by industry and marketed in the course of interstate commerce, in the United States of America, and that it becomes therefore, and is, important to the buyers of hides and shippers thereof, all through the country including such hides in competition with similar dealers and traders throughout the United States, to know by telegraphic advices the prevailing price of such hides from day to day and the market fluctuations thereof, and immediately at such times as may be advantageous and advisable, to market such hides by telegraphic bargains and sale, and to contract for the immediate delivery thereof, in said cities of Chicago, New York and Boston, by fast transportation as soon as the same may, by the use of modern business methods and railroad facilities, be accomplished; that, not to observe these conditions and transact business as rapidly as possible, utilizing all the facilities of modern commercial usage, would be to fail utterly to get the hides so produced in New Mexico and Arizona, into the said markets, and would result in the abandonment of interstate dealings in hides, so far as the producers of hides in the Territory were concerned; that by the terms of said inspection law, no time is specified for inspection, nor is the said Cattle Sanitary Board nor any inspector placed under any legal obligation to make inspection at any time, or with any diligence, nor is any remedy provided or given to relator by which the inspection of such hides by said board or its officers can be compelled at any time or place, nor is any remedy given the shipper for the utter failure of said board and its officers to do their duty in his behalf at any time, nor are the said hides made subject to taxation in any sense until the same are offered for extra-territorial shipment; that in consequence thereof, it is impossible for relator promptly or in a business like way, or in equal competition with other dealers throughout the United States to market his said hides, but when relator may have concluded to ship the same, it would become necessary, under the

operation of said law, to await the pleasure and convenience of the inspectors of said Cattle Sanitary Board, gathered from all the various districts of the Territory of New Mexico, to inspect and tag the said hides so as to qualify the same for shipment; that in these matters and things the said law is impractical, unenlightened, and barbaric in its disregard of the necessity of modern business methods, and a gross and ruthless interference with interstate commerce.

"m. That the said law is unequal in its imposition upon extra-territorial shippers of hides of infinite delay in the inspections of their hides, until the pleasure or convenience of the inspectors, whereas butchers and slaughterers of cattle within the Territory of New Mexico are only required to hold the same for inspection for thirty days after killing; it being further the fact that each and all of the hides so offered for shipment by relator are of the class known as "dry hides" and necessarily of the age of from thirty to sixty days or more, and that a large percentage of them have come from the hands of butchers who have held them for inspection the thirty days required by law.

"n. That the sad law interferes with interstate commerce in requiring the holding of hides designed for extra-territorial shipment, until the same have been inspected at the pleasure and convenience of the Cattle Sanitary Board, and discriminates against interstate commerce in so providing and in requiring a tax or charge to be paid thereon, and in providing the limited term of thirty days for the inspetcion of such hides when in the course of local trade, and in not requiring any fee or charge thereon.

"o. That the pretended inspection provided for by said act is without purpose or object as an inspection law, requiring only the keeping of a memorandum of the brands and the name of the shipper, otherwise called the purchaser, which data can have no legal efficacy for the protection of the health or property or safety of the people of the Territory of New Mexico; that no provision is made for the withholding from shipment of

any unbranded hides or of any hides which the inspector may have reason to believe have been dishonestly taken by any person, or for the withholding of any hides which may appear to be infected in any way, but the same are entitled to be tagged and shipped, that instead of protecting the property, health, morals or safety of the people of New Mexico, the said law thus facilitates the exportation of stolen or infected hides, which being tagged are entitled to be taken beyond the boundaries of the Territory of New Mexico by railroad or common carriers, and are always, without tags or inspection, permitted to be taken beyond said boundaries by private exportation; that the keeping of a record of the brands and the name of the shipper affords no conceivable remedy to the original owner of such hide, nor to any intermediate owner, in case the same has been stolen from him, nor does it avail him anything to be able to trace the property so stolen to any outgoing freight car carrying the same away from New Mexico as no record of the consignee is required to be kept; nor does the said act on the other hand afford any assistance in the detection of any possible thief of such hide in the Territory of New Mexico, inasmuch as no record of the person who sold the hide to the shipper is required to be kept, or can be legally exacted under such law, nor does such enactment in any way aid or give assistance to any section or article in the penal code of the Territory of New Mexico; wherefore the said statute utterly and entirely fails to establish a police regulation of any efficacy whatever, but simply makes an indefinite memorandum of useless facts, containing the fact that the shipper named has exported from the Territory a certain number of hides, bearing certain brands, or bearing no brands at all, and which said hides, may have originated in the Territory of Arizona, the Republic of Mexico, the State of Colorado, the States of Texas, or the Territory of New Mexico, and which said hide may have been in the possession and in the warehouse of said shipper for any term or period from thirty days to about a year.

"p. That the said inspection law is incapable of due or reasonable execution for the reason that when hides have been stored, as is customary in trade therein, in warehouses, the same are classified by their quality, and the place of their origin is lost sight of, whence it becomes impossible to tell in what district of New Mexico said hides may have originated or whether in New Mexico at all; and for the further reason that in bartering and trading from hand to hand throughout the country said hides are often times exposed to the weather, and become hard and damaged thereby, and it becomes impossible in many instances for any inspector or other

See Trans. pp. 7, 8, 9 *and* 10.

person to decipher the brand thereon."

A statute may be void by reason of its operation, although valid on its face.

"And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous, where the tax laws of a state, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts, prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

Virginia Coupon Cases, 114 *U. S.*, 295.

The attention of the court is also called to the following cases discussing the question of the reasonableness of such laws, both in their language and their operation:

Brimmer vs. Rebman, 138 *U. S.*, 78.
In re Rebman, 41 *Fed. R.*, 867.
Walling vs. Michigan, 116 *U. S.*, 446.

A specific tax obliging mining companies to pay more upon mineral obtained in the state, and exported before it is smelted, than on that which is smelted within the state, is a tax on interstate and foreign commerce, and is void.

Jackson Mining Company vs. Auditor General, 32 Mich. 488.

V.

THE LAW IN QUESTION, IN CHARGING A FEE OF TEN CENTS PER HIDE, FOR AN INSPECTION MADE AS WE CONTEND AT THE PORT OF SHIPMENT, WHERE HIDES MUST BE ASSUMED TO BE IN EXISTENCE IN SHIPPING QUANTITIES, OR CARLOAD LOTS, IMPOSES A CHARGE WHICH IS APPARENTLY LARGELY IN EXCESS OF THE COST OF SUCH INSPECTION.

In the writ in this case, it is alleged:

"i. That said pretended fee or charge is largely in excess of the amount of fee or charge which might be absolutely necessary for the making of an inspection such as is required by said pretended enactment, it being the fact that hides as aforesaid are gathered for exportation, in carload lots, in the said towns of Albuquerque, Santa Fe and Las Vegas, and that shipments are made from said points about twelve to fifteen times per year, on an average; that at such times there are on hand for shipment large numbers of hides, varying from 1000 to 3000, and that the same can be inspected at the rate of at least 400 per day, before being baled and compressed for shipment as hereinafter stated; that at such rate of inspection the amount of such inspection

fees would be at least forty dollars per day, whereas the fees and compensation of an inspector of the Cattle Sanitary Board are fixed by law at $2.50 per day, and necessary expenses, which said expenses could not exceed $5.00 per day i nthe discharge of his duties."

Trans. p. 6.

In the opinion of Associate Justice Pope, at folio 53 of the transcript herein, this allegation is discussed, and the learned judge italicizes the word "might" in the second line above, arguing that the same makes the allegation not a positive one. In passing, it is respectfully submitted that the word "might" in this connection means "could," and that the allegation is simple and direct to the effect that the fee charged is more and a great deal more than could in any event be considered as the necessary expense or cost of the inspection, under the circumstances under which the inspection of hides tendered for export is made. Judge Pope says in his opinion that "Relator overlooks the fact that there may be days when the inspector inspects only a few hides, instead of 400, and yet with the same expenses and per diem." it is not reasonable or even possible under the alleged conditions governing this trade, to assume that a few hides will ever be offered for export. It is distinctly averred that hides are only exported in carload lots.

"All pleadings must be construed reasonably and not with such strictness as to refuse to adopt the natural construction of the pleading because a particular fact might have been more distinctly alleged(although its existence is fairly, naturally and reasonably to be presumed from the averments in the pleadings."

Lockhart vs. Leeds, 195 *U. S.*, 435.

By the report of the Governor of New Mexico to the 36th Legislative Assembly, dated January 16th,

1905, and the Report of the Cattle Sanitary Board thereto attached, it appears, for illustration, that during the five months from July to November, 1904, inclusive, the total receipts from hide inspection were $1110.38. The disbursements of the board for the same period contain only three items which could be properly be charged in part to the inspection of hides, namely, stationery and postage, $85.80; salary of secretary, $333.48; and general expense account, $766.22; making a total of $1185.10. But it is apparent that the larger portion of these items should be charged to funds derived from the other functions of the board. By Section 222, Compiled Laws of 1897, "All inspection fees and charges shall be paid to the Secretary of said Board who shall transmit the same to the Territorial Treasurer to be placed to the credit of the Cattle Indemnity Fund." This is the general fund into which all the revenues for the support of this board are put. Out of this fund are paid all the expenses of the board, in connection with its primary quarantine duties, the salary of its veterinary surgeon, the salary of its cattle inspectors, all expenses concerning the enforcement of quarantine, the sale of condemned cattle, the keeping of record books concerning cattle, the payment of indemnities for slaughtered cattle, and other expenses shown by the laws authorizing them to be entirely disconnected with the business of inspecting hides or of keeping a record of the brands thereon. It seems to us that the allegation quoted, to the reasonable effect that the income from hide inspection is greater than the cost might possibly be, was certainly sufficient to justify an inquiry, upon issue joined, as to the truth of said allegation. The cases already cited show conclusively that when the tax imposed is diverted to any other purpose, then that

which "May be absolutely necessary for executing the inspection laws," the statute is void. It becomes at once stamped as a revenue law, instead of a legitimate inspection law, confining its charges to the actual necessities of the inspection.

By reference to Section 203 of the Compiled Laws, it will be seen that it is paid out to the veterinary surgeon, the attorneys, salaries for officers of the Board and for indemnities to cattle. By a reference to the annual printed report of the Cattle Sanitary Board for the year 189), the Board received $15,866.29, out of which $8,707.32 was paid to inspectors, and $3,370.76 was paid for other expenses of the Board. For the year 1900 the Board received from various sources $15,875.29, out of which it paid for inspections $9,288.36, and $6,008.78 for other expenses of the Board, clearly showing that a large part of its revenues were paid out for expenses other than inspection fees.

The findings of the Court in its opinion and the admissions made by the demurrer substantiate this state of facts.

This was the situation in the case of American Fertilizing Company vs. Board of Agriculture of North Carolina, 43rd Federal Reporter, 609; in which case it appeared that the statute exacting the license did not confine its charge to the legitimate expenses of the inspection. In the later case of Patapsco Guano Company vs. North Carolina, 171 U .S., the following significant language, concerning the state of the statutes in the former decision, was used:

"We agree entirely with the Circuit Court that the Legislation of 1891 not only amended the Code in the matter of the requirement of the privilege tax of

$500.00, but repealed all laws making any substantial diversion of the money to be derived from the charge on fertilizers of twenty-five cents per ton, to any other purposes than those connected with the necessary expenses of inspection."

In considering the Patapsco case, it must be borne in mind that the law concerning the inspection of fertilizers, was a law which contained actual features of inspection of the article, determining its character and quality, and classifying it and certifying it for the market. The good faith of the statute was apparent; the good faith of the statute of New Mexico is not apparent from its face, because it contemplates no legitimate inspection, nor does it fairly indicate an intent to detect crime, because it makes no similar effort to inspect hides as a prerequisite to local commerce. The use made of the fund, that is to say, the putting of the fund into the Cattle Indemnity Fund, is a circumstance to be taken in connection with all others, to show the object of the statute, as a law for the production of revenue, rather than a law for any recognized class of inspection. The same difference in the apparent objects of the law is discernible in the case of Neilson vs. Garza, 2nd Woods, 287, which has been much relied upon by opposing counsel. The opinion in that case, comes back to the original question as follows:

"Then we are brought back to the question whether the law is an inspection law. If it is, we cannot interfere with it on account of supposedexcessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with the free importation of goods . . . The law creates the office of inspector, to be elected by the voters of the county; it requires of him a bond and oath of office; it requires him to keep a book of records of his inspections; it requires him to examine and inspect all hides

or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment; and all animals driven or sold in his district for slaughter to packeries or butcheries; it directs the method of inspection, branding and recording, animals and hides; it requires him to prevent the sale or removal out of the county of hides or animals upon which the brands cannot be ascertained, unless identified by proof, etc.; it gives him power to seize and condemn unbranded animals or hides. Various other regulations are imposed in the act."

It is apparent that this was much more clearly a bona fide inspection or examination, than the New Mexico Statute.

It is believed that the diversion of the said funds from the legitimate expenses of inspecting, is well pleaded and set forth in the following paragraph of the writ, in this case:

"j. That said pretended fee or charge so imposed upon interstate commerce is not by law used to cover the expenses of said inspection, nor paid to said inspector for his per diem or expenses, but is directly by law attempted to be appropriated to the general fund for the support of the said Cattle Sanitary Board in all its functions, the said fund being known as the Cattle Indemnity Fund, out of which the said board pays: the compensation of the veterinary surgeon employed by it, not more than $1500.00 per year and actual necessary expenses, the duties of which said official relate exclusively to quarantine and health service and are confined to cattle, and have nothing to do with hides; the compensation of assistants employed by said board, at $2.50 per day and expenses, their duties being generally in quarantine service and the inspection of slaughter houses; the compensation of other assistants who may be requisite, under Section 190 of the Compiled Laws of 1897, in the sanitary protection of cattle, whose duties have naught in common with the inspectionof hides; the actual and necessary expenses of the

sessions of the Cattle Sanitary Board and the expenses for books and records necessary under the quarantine regulations, and for salary of secretary; expenses incurred in the slaughter of infected animals, under the quarantine regulations, and for burning the carcasses thereof; all indemnities to owners of cattle for cattle destroyed under the quarantine statutes; expenses for inspecting slaughter houses and general expenses of said board, whereby the said inspection fee or charge assessed against hides, designed for extra-territorial shipment by railroad or common carrier, becomes purely a tax for general revenue purposes, and not solely or exclusively for the making of the inspection therein mentioned."

Trans. p. 6.

It will be remembered that the Cattle Sanitary Board was already in existence, performing all its functions, in reference to cattle, and quarantine, before the passage of the present law; that the salaries of the officers have not been increased, to cover any extra labor they may perform in keeping on file the reports of the inspectors of exported hides, and that the only expense contemplated by the law, in such inspection of hides, is the salary of the inspector, at $2.50 per day, and his necessary expenses, alleged in the writ not to exceed $5.00 per day in all.

In determining whether or not it was reasonable or necessary to charge a fee of ten cents each for the inspection of hides offered for shipment, or whether such a tax was disproportionate to the actual expense, the court is respectfully referred to the fact that by the statutes of the Territory concerning the inspection of cattle on the range, the reasonable fee chargeable therefor is fixed at three cents per had (Setion 2, Chapter 63, page 106, Session Laws of New Mexico of 1899). Certainly the inspection of live animals, taking data as to

their brands and markings, as they are running in the herd, is a much more difficult and expensive piece of work than the inspection of hides gathered in large quantities at railroad stations, easily accessible to the inspector. This is but another illustration of the discrimination which has resulted in this Territory, from the influence of the cattlemen, who have apparently been able to cause the legislature to overtax other property and other industries, for the support of their Cattle Sanitary Board.

VI.

THIS STATUTE IMPOSES THE BURDEN OF INSPECTION, AND THE PAYMENT OF TEN CENTS PER HIDE, ONLY UPON HIDES OFFERED TO A COMMON CARRIER FOR SHIPMENT TO A MARKET WITHOUT THE TERRITORY.

It is therefore a clear discrimination between hides to be retained and used in the Territory and hides to be shipped out. Hides may also be shipped out of the Territory by any other means of transportation than a common carrier. It would be difficult to suggest a reason for a discrimination between the two or three classes of hides. It is conceivable that the promoters of this law may have thought that, if hides could not be shipped out of the Territory, tanneries, shoe, harness, saddle, and other plants for the utilization of leather might be established in the Territory. It may not have occurred to them that under the Constitution of the United States, which was finally made an accomplished fact to prevent just such aspirations and discrimina-

tions, Colorado and Kansas have just as much right to the products of New Mexico as New Mexico to those of Kansas. President Diaz, a short time ago, by one stroke of his pen, set aside all import duties on corn coming in Mexico, in the interest of consumers. The effect was the end of the "corner." We do not rely on such exercise of authority, we do rely on our Constitution and the laws. The untrammeled interstate commerce of our country is what made our Constitution, and the greatness of our country. Any law in controversion of it is to be tested, not by "intentions," but by "possible effects." The power to tax is the power to prohibit and destroy.

McCullough vs. Maryland, 4 *Wheaton* 316.

We contend that this is a discriminating law—hides to be shipped out of the Territory are subject to this duty, hides not to be shipped out are not subject to it.

"The law in question is a discriminating law, and requires the inspection of flour brought from other states, when such inspection is not required for flour manufactured in Virginia. The aspect of the case brings it directly within the principle of Brimmer vs. Rebman, 138 U. S., 78, decided at the present term, etc."

Voight vs. Wright, 141 *U. S.*, 65.

Is there or can there be any difference between a discrimination against "importation" or "exportation?" Is the right to export not as sacred as the right to import? Can the people of one state import from another state, unless the people of the latter state can export? Here we have, however, the agent of the importer in one state prevented by an unconstitutional statute from exporting from New Mexico to his principal, who is seek-

ing to "import" into the State of Colorado.

We respectfully submit that the judgment of the court below should be set aside, and the writ granted as prayed for.

All of which is respectfully submitted.

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Attorneys for Appellants.

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MAR 20 1906

JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted].18

THE TERRITORY OF NEW MEXICO *EX REL.* E. J. McLEAN AND COMPANY, APPELLANT,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

SUPPLEMENTAL BRIEF IN REPLY TO APPELLEE'S BRIEF ON THE QUESTION OF THE JURISDICTION OF THE COURT.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

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vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

Supplemental Brief in Reply to Appellee's Brief on the Question of the Jurisdiction of the Court.

I.

It is contended by appellant that section 2 of the act of Congress of March 3, 1885 (23 Stats. at Large, 443), confers jurisdiction upon this court to entertain this appeal. The first section of this act provides that no appeal or writ of error shall be allowed, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars. The second section provides that section 1 shall not apply to any case wherein is involved the validity of a treaty or statute of or an authority exercised under the United States, but that in

all such cases an appeal or writ of error may be brought without regard to the *sum or value in dispute.*

The appellant submits that the claim of the power of the Legislative Assembly of the Territory to enact the statute requiring the relator to pay the sum of ten cents on each of the hides tendered to the defendant for shipment draws in question the exercise of an authority under the United States. As the grant of authority to legislate, together with its limitations, comes solely from an act of Congress, it would seem that the statement of the proposition would be sufficient in itself.

We will not attempt to notice all the authorities cited in appellee's brief. We submit that the decisions based upon other statutes than the one under consideration, and upon criminal cases under this statute, are not pertinent.

II.

Is this an authority exercised under the United States? We submit that validity of the act of the Legislative Assembly of the Territory of Utah, making the office of Auditor of Public Accounts elective by the joint vote of the two houses of the Legislative Assembly, was called in question in *Clayton vs. Utah,* and the court took jurisdiction of the case.

Clayton vs. Utah, 132 U. S., 632.

In *Clough vs. Curtis,* 134 U. S., which was a mandamus proceeding, the validity of the acts of a territorial legislature were passed upon, although no money judgment whatever, exclusive of costs, could have been in the record.

We also cite *United States vs. Lynch,* 137 U. S., 286; also *Maricopa and Phœnix Railroad vs. Arizona,* 156 U. S., 350.

In the last case it is true that the effect of an act of Congress granting rights of way over an Indian reservation was considered. The power of the Territory to tax the right of way under territorial legislation was also necessarily passed

upon. The railroad company was insisting that the establishment of an Indian reservation exempted it from taxation. The court passed upon the effect of the act of Congress granting the right of way, and held that it had the effect of re-establishing "the full sway and dominion of the territorial authority." In this case we contend that Congress alone has the power to legislate upon, and exercise the power attempted to be exercised by, the Territory, through its Cattle Sanitary Board.

Linford vs. Ellison, 155 U. S., 503, is much relied upon by appellee. No territorial statute was in question. It involved the validity of a village ordinance taxing farming lands so far distant from the settled portion of the village as to make the expenditure of the taxes raised by the village of no benefit to the land so taxed. The decision of the district, as well as the supreme court of the Territory, was against the validity of the ordinance. The courts of Utah held that under the territorial statute no such power of taxation was granted.

This court in the opinion in that case quotes from *Lynch vs. United States,* 137 U. S., as follows:

> "The validity of a statute, or the validity of an "authority is drawn in question, when the existence "or constitutionality, or legality of such statute, or "authority is denied, and the denial forms the sub-"ject of direct inquiry."

We submit this case to that test. The writ commands the defendant to perform its duty as a common carrier; it gives as an excuse the statute prohibiting it from accepting the hides tendered it, and transporting them. The appellant contends that the excuse furnishes no defense, because the statute is void, and the legislature had no authority to enact it.

III.

Is any money value necessary to give jurisdiction? If so, is any *sum or value in dispute?* In the case of *Clayton vs. Utah, supra,* an office was in dispute. If an office purely honorary, which carried with it no salary, fees, or emoluments, was in dispute, would the court say it had no *value* to the claimant and decline jurisdiction?

In *Clough vs. Curtis, supra,* there could have been "no sum or value in dispute." It involved the performance of a naked duty—no more.

Is any "sum or value" in dispute in this case? We submit there is. In *Territory vs. Albright* the court at the present term declined jurisdiction of a *quo warranto* case, because the term of office having expired there could be no value to the office.

We submit the performance of a duty is presumed to be of some value in money to the person who demands its performance. Specific property, real or personal, when its recovery is sought, may as a matter of fact be valueless to the claimant. It may subject the claimant to loss and not gain, but the law presumes it to be of value and for the unlawful withholding of it accords him at least nominal damages. Would this court decline jurisdiction in an equity case for an injunction when no relief was prayed for a money recovery? If the construction contended for by appellee is to be adopted, this would seem to follow. Not only that, but no redress by appeal to this court can be had from the decisions of territorial courts sustaining any unconstitutional legislation, whatever may be its effect, unless, in the suit brought to test it, the recovery of some sum of money is sought.

Respectfully submitted.

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MAR 6 1906

JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted]18

THE TERRITORY OF NEW MEXICO ex REL. E. J. McLEAN & COMPANY, APPELLANT,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

BRIEF ON BEHALF OF APPELLEE.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

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vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT.

This is an appeal from the judgment of the supreme court of the Territory of New Mexico, wherein that court affirmed a judgment of the district court sitting within and for the county of Santa Fé, in the Territory of New Mexico, sustaining a motion to quash an alternative writ of mandamus issued upon the relation of E. J. McLean & Company *vs.* The Denver and Rio Grande Railroad Company. From the writ it appears that the relators, appellants, had delivered to the agent of the defendant at Santa Fé, New Mexico, a bale

of dry hides consigned to relators at Denver, Colorado, to which point from Santa Fé the defendant's railroad line extended; that the defendant railroad company refused to receive and ship said bale of hides for the reason that they were to be forwarded beyond the boundary line of the Territory and did not bear the requisite evidence of inspection by an authorized inspector of the cattle sanitary board of New Mexico, as required by section 3 of the act of the legislature of the Territory approved March 19, 1901. Sections 3 and 4 of the act are as follows:

> "SECTION 3. Hereafter it shall be unlawful for any person, firm or corporation to offer, or for any railroad company, or other common carrier to receive, for the purpose of shipment or transportation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof, a fee or charge of ten cents and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of the purchaser and shipper of the hides, as well as all the brands thereon, which said report shall be preserved by the secretary as a part of the records of his office."
>
> "SECTION 4. Any person, firm or corporation, common carrier, railroad company or agent thereof, violating any of the provisions of this act or refusing the inspection of any hides as herein provided shall upon conviction thereof be deemed guilty of a misdemeanor and shall be fined in any sum not exceeding one thousand dollars for each and every violation of the provisions of this act."

ARGUMENT.

I.

JURISDICTION TO ENTERTAIN THE APPEAL.

A preliminary question is, Has this court jurisdiction to entertain the appeal?

The act of Congress of March 3, 1885, 23 Stats. at Large, 443, contains the grant of power conferring jurisdiction upon this court to review judgments of the supreme courts of Territories.

Section 1 of the act provides that no appeal or writ of error shall be allowed from any judgment or decree in any suit at law or in equity in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

Section 2 provides that section 1 shall not apply to any case wherein is involved the validity of a treaty or statute of or an authority exercised under the United States, but that in all such cases an appeal or writ of error may be brought without regard to the *sum or value* in dispute.

The matter in dispute in this case not exceeding five thousand dollars, jurisdiction to review this judgment is not granted by section 1 of the act.

It now remains to consider whether the exception contained in section 2 of the act confers jurisdiction upon this court.

Section 2 excepts from the operation of section 1 all cases wherein is involved the validity of any patent or copyright or in which is drawn in question the validity of a *treaty* or *statute of* or *an authority exercised under* the United States and provides for a review of judgments in such cases without regard to the sum in dispute.

It appears from the record in this case that the controversy concerns the validity of a statute *not* of the United States, *but* of the Territory of New Mexico, and that the matter in dispute is the duty of the respondent common carrier to receive for transportation the hides tendered it by the relator, E. J. McLean & Company.

The judgment of the New Mexico court in effect is that the duty did not exist.

Had the judgment been for relator the effect of the judgment simply would have been that the duty to receive the hides for transportation *did* exist, and under the mandate of the New Mexico court the respondent would have been required to both receive and transport the hides tendered it by relator, notwithstanding the New Mexico statute, the validity of which is, by this action, drawn in question.

In either case the pecuniary status of both relator and respondent would have been the same and by the judgment of the court would have remained unchanged.

It is thus apparent that the dispute in this cause concerns nothing of pecuniary value, but merely the existence or nonexistence of a duty not capable of being estimated in money values.

Under section 2 of the act there must be a controversy, first, drawing in question the validity of a statute of or authority exercised under the United States, and, second, there must be involved in the controversy something of a pecuniary value or some matter the value of which may be estimated in money. Unless both these elements are presented by the controversy this court is without jurisdiction to review this judgment.

The controversy does not draw in question the validity of a statute of or authority exercised under the United States.

To draw in question the validity of a statute or authority exercised under the United States it is plainly evident that the record must somewhere present a denial of such validity.

There is no assertion anywhere in this record that a statute

or authority of the United States is invalid. The validity of a thing can only be questioned by an affirmative assertion of its invalidity.

The measure of jurisdiction is not controlled or in any manner influenced by the assertion that the New Mexico act is unconstitutional as being in conflict with the interstate commerce clause of the Constitution.

Jurisdiction is made to depend entirely on an assertion that a statute of or authority exercised under the United States is invalid and in a cause where something of value is disputed over.

It is evident that the validity of a statute of the United States is not by this action drawn in question. Is the validity of "an authority exercised under the United States" drawn in question? An authority exercised under the United States evidently refers to some tribunal or power brought into existence by the Congress of the United States. The New Mexico legislature is the authority of which relators complain, but they do not assert the invalidity of that authority. They merely assert that an act of that authority is invalid. The validity of the power or authority that performed the act is not challenged, but it is asserted that a lawful and valid authority or tribunal committed error in the exercise of its jurisdiction by enacting an invalid law.

There is a plain and manifest distinction between drawing in question the validity of *an authority* and the validity of *an act* of that authority.

The utmost that can be claimed with respect to the case at bar is that it involves a dispute, not as to the *validity* of an authority exercised under the United States, but concerning the rightful and proper exercise of power by a conceded valid authority.

This court has in numerous cases held that it was without jurisdiction to review judgments such as this one wherein was drawn in question, not the validity of a statute of or

authority exercised under the United States, but the validity of the thing done or act performed by the authority; thus In Snow *vs.* United States, 118 U. S., 346, this court said:

> "In the present case, the validity of a statute of the United States is not drawn in question. No such question is presented by the bills of exceptions, or the requests for instructions, or the exceptions, to the charges, or anywhere else in the records. Nor is the validity of an authority exercised under the United States drawn in question. The plaintiff in error contends that the construction of the act of 1882 is drawn in question, and also the authority exercised under the United States by which he was tried and convicted; that the authority of the United States is invoked to deprive him of his liberty, in a court established by Congress, and acting solely by Federal power; and that the question is, whether the authority exercised by the court under the act of 1882 is a valid authority, and within the scope of that act, because the contention is that the court misconstrued the statute and acted beyond the authority which it conferred. The authority exercised by the court in the trial and conviction of the plaintiff in error is not such an 'authority' as is intended by the act. The validity of the existence of the court, and its jurisdiction over the crime named in the indictments, and over the person of the defendant, are not drawn in question. All that is drawn in question is whether there is or is not error in the administration of the statute. The contention of the plaintiff in error would allow a writ of error from this court in every criminal case in a territory where the prosecution is based on a statute of the United States; and, indeed, might go still further, for the authority of every court sitting in a Territory is founded on a statute of the United States. From the fact that a given criminal case involves the construction of a statute of the United States, it does not follow that the validity of 'an authority exercised under the United States' is drawn in question."

And in Baltimore and Potomac R. Co. *vs.* Hopkins, 130. U. S. 210, wherein this court cited the case of Millinger *vs.* Hartupee, 72 U. S., 6 Wall., to the effect that:

> "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real *existence*, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States." "In many cases the question of the *existence of an authority* is so closely connected with the question of its *validity* that the court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order. But where, as in this case, the single question is not of the validity but of the existence of an authority, and we are fully satisfied that there was, and could have been, no decision in the State court against any authority under the United States existing in fact, and that we have, therefore, no jurisdiction of the case brought here by writ of error, we can perceive no reason for retaining it upon the docket."

this court said:

> "The jury were told that all stoppage of trains and shifting of cars necessary for carrying cars out of its freight depot over the different tracks for the purpose of making up freight trains were lawful. The right of the railroad company to establish freight stations or to lay as many tracks 'as its president and board of directors might deem necessary,' was not questioned. But the court also held that the company was not justified in occupying the public streets for the purposes of a freight yard, as such, because the various statutes bearing upon the matter did not authorize such occupation, with which conclusion we are inclined to agree, though we forbear a determination of the point

until presented in a case properly pending before us. *The validity of the statutes*, and the *validity of authority* exercised under them, are, in this instance, *one and the same thing*, and 'the validity of a statute' as these words are used in this act of Congress, refers to the *power* of Congress to pass the particular statute at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power. In our opinion the validity of no act of Congress, or authority under the United States, was so drawn in question here as to give us jurisdiction, and therefore, as the amount of the judgment did not exceed five thousand dollars, the writ of error must be dismissed."

And in Lynch *vs.* United States, 137 U. S., 280, this court said:

"It is now argued that the duty of the Fourth Auditor and of the Second Comptroller, under the last clause of section 2 of the act of 1835, and the decision of this court in relation to it, was merely ministerial, and that by the disallowance of relator's claim for mileage, these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question. In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, *nor is the* validity of an authority, every time an act done by such *authority is disputed*. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

"We think that the authority of the Second Comptroller and the Fourth Auditor is not thus denied here, nor the validity of that authority questioned, but that what is claimed is that in the exercise of a valid authority, the Auditor and Comptroller erred

in respect to an allowance, in view of the decision of this court in another case."

"The contention of the relator is, that the interpretation he puts upon the act is too obviously correct to admit of dispute, and that this court has so decided; but it does not follow, because the decision of the Comptroller and Auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. What the relator sought was an order coercing these officers to proceed in a particular way, and this order the supreme court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the Auditor to audit the account, and in the Comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority (Snow *v.* United States, 118 U. S., 346, 353; Baltimore and Potomac Railroad Co. *v.* Hopkins, 130 U. S., 210)."

And in Cameron *vs.* United States, 146 U. S., 533, this court said:

"Nor can our jurisdiction be sustained under the second section of the act of March 3, 1885, providing that the limit of $5,000 shall not apply to any case 'in which is drawn in question the validity of a * * * statute of or an authority exercised under the United States;' since this refers to an authority exercised or claimed in favor of one of the parties to the cause, the validity of which was put in issue on the trial of the case, and not to the validity of an authority exercised by the United States in removing the fence pursuant to the judgment of the court. If the latter were the true construction, then every case in which the court issued an injunction or an execution might be said to involve the validity of a statute or an authority exercised under the United States, since it is by virtue of such authority that the marshal executes the writ. No question is raised here as to the

validity of a statute, but merely as to the application of the statute to this case."

And in Seymour *vs.* South Carolina, 152 U. S., 353, this court said:

"and if the value of the registration is susceptible of an estimate in money, there is no evidence whatever in the record tending to show this value."

"It is not, and could not be, pretended that in this case there was 'involved the validity of any patent or copyright;' and, in the light of previous decisions of this court, it is quite clear that there was not 'drawn in question the validity of a treaty or statute of or an authority exercised under the United States.'"

And in Linford *vs.* Ellison, 155 U. S., 503, this court said:

"It is thus seen that the decision of the supreme court of the territory involved the construction of the organic law and the scope of the authority to legislate conferred upon the territorial legislature; but that the validity of that authority and of the statute was not drawn in question. In order to give us jurisdiction of this appeal, the matter in dispute exclusive of costs must have exceeded the sum of $5000, or else, without regard to the sum or value in dispute, the validity of a patent or copyright must have been involved or the validity of a treaty or statute of or an authority exercised under the United States have been drawn in question. Act of March 3, 1885, C. 355, 23 Stat. 443. Confessedly, the matter in dispute here did not reach the requisite pecuniary value, and the validity of no patent or copyright was involved, nor was the validity of a treaty questioned; and, as just stated, we are of opinion that the validity of no statute of the United States, nor of an authority exercised under the United States, was drawn in question within the intent and meaning of the jurisdiction act."

Linford *vs.* Ellison, *supra*, is exactly in point upon this inquiry, indeed it absolutely controls the question of juris-

diction in the case at bar. In that case the judgment of the supreme court of Utah Territory "involved the construction of organic law (statutes of the United States) and the *scope of the authority* to legislate conferred upon the legislature of "Utah." In the case at bar the most that can be said in favor of jurisdiction to review this judgment is that "*the scope of the authority* to legislate conferred upon the New Mexico legislature is drawn in question," but as was said in that case, "the validity of that authority *and* of the organic act conferring the authority (statute) was not drawn in question."

Comparing the above cited cases wherein it was held that this court was without jurisdiction to review the judgment of the supreme courts of the Territories and the District of Columbia, because there was *not* drawn in question the *validity* of a statute of or authority exercised under the United States, with the case of *Clough vs. Curtis*, 134 U. S., 361, where this court held it had jurisdiction because there was "directly drawn in question the lawful existence" of the territorial legislature of Idaho, and the case of *Traction Co. vs. Hof*, 174 U. S., 1, where this court entertained jurisdiction because there was drawn in question the validity of certain acts of Congress (statutes of the United States), it is at once apparent and easily determined which judgments of the supreme courts of the Territories may and which may not be reviewed by this court, and that the case at bar falls within the rule announced in Linford *vs.* Ellison, *supra*.

Even if it could be held that the validity of an authority exercised under the United States was in this cause drawn in question, still there is nothing of pecuniary value or matter the value of which is capable of being estimated in money involved in the controversy, and this court is for that reason without authority to review the judgment rendered in it.

It has been many times held by this court that in order to sustain the appellate jurisdiction of this court under either

section of the act of Congress of March 3, 1885, the matter in dispute must have been money or something, the value of which can be estimated in money.

Perrine *vs.* Slack, 164 U. S., 452.
Durham *vs.* Seymour, 161 U. S., 235.
Kurtz *vs.* Moffitt, 115 U. S., 487, 495, 496.
Caffrey *vs.* Oklahoma, 177 U. S., 346.
De Kraft *vs.* Barney, 2 Black, 704.
In re Chapman, 156 U. S., 211.
Cross *vs.* Burke, 146 U. S., 82.
In re Heath, 144 U. S., 92.
Farnsworth *vs.* Montana, 129 U. S., 104.
Sinclair *vs.* Dist. of Columbia, 192 U. S., 16.

The matter in dispute in this case was not money, and the remaining inquiry is whether it is a right the value of which can be ascertained in money.

As we have already indicated, the pecuniary status of the appellant has not been changed by this judgment. In Caffrey *vs.* Oklahoma Territory, 177 U. S., 346–349, this court said: "In the pending action the plaintiff in error and appellant has neither gained nor lost any money's worth by the judgment of the supreme court of the Territory." What can appellant in this action claim he has been deprived of by this judgment? The amount of freight for hauling the hides is not in controversy. The charge for hauling the hides is the same whether they were inspected or not inspected. He is neither charged with nor relieved from the payment of the inspection fee of ten cents per hide required to be paid by the New Mexico statute, nor does the judgment cast upon appellant the duty of defraying the inspection fees.

The collateral effect of the judgment cannot be inquired into in this inquiry for the purpose of determining whether this court has jurisdiction. The judgment itself must carry with it the elements which confer jurisdiction.

In Elgin *vs.* Marshall, 106 U. S., 578, this court held that the matter in dispute on which the jurisdiction of this court depends "is the matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered; and the court is not permitted for the purpose of determining its sum or value to estimate its collateral effect in a subsequent suit between the same or other parties."

See also Bruce *et al. vs.* Manchester and Keene R. R. Co., 117 U. S., 514.

In Durham *vs.* Seymour, 161 U. S., 235, there was involved the question whether Durham was entitled to receive a patent for his invention. The appeal was dismissed, the court saying:

> "The right to apply for a patent was being availed of in this proceeding, and the invention cannot be regarded for jurisdictional purposes as in itself property or a right of property having an actual value susceptible of estimation in money.
>
> "Whether the alleged invention were patentable or not was the question, and that question had no relation to its value in money. If the invention were not patentable, Durham had suffered no loss; if the invention were patentable, it was not material whether it had or had not a money value.
>
> "The bill, properly enough, does not allege that any sum of money was in dispute, although there are averments that the value of the invention is generally recognized, and that sundry persons are deriving large profits in making the device sought to be patented. Evidence of that kind, though not controlling, is sometimes introduced in suits on patents as indicative of invention in the production of new and beneficial results, but it is not relevant here, nor are the affidavits presented on the question of value if the patent were granted. The matter in dispute must have actual value, and that cannot be supplied by speculation on the possibility that, in a given case, an invention might be held patentable."

In *In re* Belt, petitioner, 159 U. S., 95–100, this court observed:

> "We have heretofore decided that this court has no appellate jurisdiction over the judgments of the supreme court of the District of Columbia, in criminal cases, or on *habeas corpus;* but whether or not the judgments of the supreme court of the District, reviewable in the Court of Appeals may be reviewed ultimately in this court in such cases, when the validity of a statute of or an authority exercised under the United States is drawn in question, we have as yet not been obliged to determine."

But in Washington and Georgetown Railroad *vs.* District of Columbia, 146 U. S., 227–231, it was held that

> "Both sections of the acts of March 3, 1885, regulating appeals from the supreme court of the District of Columbia apply to cases where there is a matter in dispute measurable by some sum or value in money."

However, in Chapman *vs.* United States, 164 U. S., 436, this court by its opinion in that case foreclosed all speculation as to whether it was requisite that there should be some sum or a matter capable of being estimated in money in dispute in order to give this court jurisdiction to review judgments of the supreme courts of Territories under the second section of the act of March 3, 1885. In citing Farnsworth *vs.* Montana, 129 U. S., 104, the court said (p. 448):

> "In Farnsworth *v.* Montana, in which it was claimed that the validity of an authority exercised under the United States was drawn in question, it was held that the second section of the act did not extend to criminal cases, but that both sections applied to cases where there was a matter in dispute measurable by some sum or value in money. The view taken was that the second section contained an exception or limitation carved out of the first section, and that the words, that in the enumerated cases, 'an appeal or writ of error may be brought without

> regard to the sum or value in dispute,' clearly implied that in those cases also there must be a pecuniary matter in dispute measurable by some sum or value, though not restricted in amount."

In this case there was involved the construction of section 8 of the act of February 9, 1893, establishing the Court of Appeals of the District of Columbia, and in discussing the effect of that section the court said:

> "We regard this section and the act of 1885 as the same, in their meaning and legal effect. The act of 1885 prohibits appeals or writs of error, unless the matter in dispute exceeds the sum of $5,000, and provides that the restriction shall not apply to certain enumerated cases, 'but that in all such cases an appeal or writ of error shall be brought without regard to the sum or value in dispute.'
>
> "The act of 1893 allows appeals or writs of error whenever the matter in dispute exceeds the sum of $5,000, and also in cases 'without regard to the sum or value of the matter in dispute,' wherein the validity of any patent or copyright or of a treaty or statute of or an authority exercised under the United States is drawn in question, being the same cases mentioned in the second section of the act of 1885. We think as that section clearly applied to cases where there was a pecuniary matter in dispute, measurable by some sum or value, as has been repeatedly decided, the last clause of section eight of the act of 1893 must receive the same construction. The meaning of both statutes is that in the cases enumerated the limitation on the amount is removed, but both alike refer to cases where there is a pecuniary matter in dispute, measurable by some sum or value, and they alike have no application to criminal cases."

The rule that this court has no jurisdiction to review judgments of the supreme courts of the Territories under the second section of the act of March 3, 1885, unless there is in controversy some sum of money or matter the value of which may be estimated in money, excludes alike judgments in criminal and civil cases, unless they fall outside the rule laid down in Chapman *vs.* United States, *supra*, thus:

In Cross *vs.* Burke, 146 U. S., 82, a civil proceeding, this court held it was without jurisdiction to review a judgment rendered in a *habeas corpus* proceeding, saying: "In order to give this court jurisdiction under the act of March 3, 1885, the matter in dispute must be money or some right the value of which in money can be calculated and ascertained. And as in this case the matter in dispute has no money value, the result is that no appeal lies."

And in Perrine *vs.* Slack, 164 U. S., 452, in a civil action involving a controversy as to the custody of two children, this court followed the rule laid down in Chapman *vs.* United States, 164 U. S., 452, saying: "We are of opinion that the writ of error will not lie. The controversy is between the mother and the testamentary guardian of the infant children, each claiming the right to their custody and care, and the matter in dispute is of such a nature as to be incapable of being reduced to any pecuniary standard of value."

It seems, therefore, to be incontrovertible that there is not drawn in question in this action the validity of a statute of or authority exercised under the United States, and as the matter in dispute is incapable of being reduced to any pecuniary standard of value the appeal herein should be dismissed.

II.

THE MERITS.

In respect to the merits of the case the only question involved is whether sections 3 and 4 of the act of March 19, 1901, are valid.

In regard to this question the trial court and the supreme court of New Mexico held that they are. There, as here, the relators assailed them upon the ground that they are obnoxious to the last clause of section 1 of the fourteenth amendment to the Constitution, in that they discriminate between different classes of citizens; and that they are in conflict with the commerce clauses of the Constitution.

POINTS AND ARGUMENT.

The inquiry of the court in determining the validity of the legislation asserted to be invalid by appellants is limited to the question of *power* in the legislature to pass it. The inquiry does not extend to matters of expediency.

Congress in organizing the Territory of New Mexico enacted that the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.

Sec. 1851, R. S. U. S.

It thereby necessarily vested the legislature with the police and taxing power of the Territory, and the Territory has by this grant of power the unrestrained right to exercise either its police or its taxing power to the same extent that a sovereign State may exercise those powers.

Walker *vs.* Southern Pac. R. R. Co., 165 U. S., 593.

Appellants challenge the legislature's power to enact the provisions of law under discussion upon the ground that they conflict with the Federal Constitution.

In the case at bar the limitations of the Federal Constitution upon the legislative power of the Territory which need at all be considered in this connection are the two contained in the third clause of section 8 and the second clause of section 10 of article 1 of the Constitution, providing respectively that

> "Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes," and
>
> "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be necessary for executing its inspection laws," etc.

The consideration of the provisions of sections 3 and 4 of chapter 45, *supra*, presents two general propositions, under either of which the power of the legislature to enact them is vindicated.

1. The power of the Territory under the law is exercised upon the hides before they have become interstate commerce, and the validity of the act is sustained upon the broad principle that it was enacted by the Territory in the rightful exercise of its police power.

2. If the hides in question should be considered "interstate commerce," at the time the law acts upon them, still the act is not in collision with the commerce clause of the Constitution and is valid, it being a legitimate inspection law enacted in the rightful exercise of the Territory's police power.

We will consider these propositions separately.

The supreme court of New Mexico, it seems from its opinion, rejected the proposition that the hides in question were not interstate commerce at the time the New Mexico statute operated upon them and required their inspection, but upheld the validity of the statute upon the theory that the statute complained of was a valid inspection law, notwithstanding it operated upon interstate commerce.

Clearly, the act is an inspection law. Why? For the sole reason that in its enforcement it requires inspection of personal property or the examination thereof.

Inspection laws, all of which are properly referred to the police power of a State, may be grouped under two heads:

(*a*.) Such laws as require in their enforcement the inspection or examination of personal property before it is interstate commerce.

(*b.*) Such laws as require in their enforcement the inspection or examination of personal property at a period when such property *is* interstate commerce.

The New Mexico statute necessarily falls under the one or the other of these two heads, and may be valid under either.

All inspection laws, which operate upon personal property at a period when such property is not interstate commerce or not foreign commerce, as a matter of course do not come in collision with the commerce clauses of the Federal Constitution.

As this court observed, in the case of Patapsco Guano Co. *vs.* North Carolina, 171 U. S., 345–'57 :

> "Whenever inspection laws act on the subject *before* it becomes an article of commerce, they are *confessedly* valid, and also when, although operating on articles brought from one State into another they provide for inspection in the exercise of that power of self-protection commonly called the police power."

It is our purpose in this discussion to show conclusively that the power of the Territory under the law is exerted upon the hides before they have become interstate commerce, and the law which requires their inspection is therefore "*confessedly valid.*"

The act complained of is a part of that mass of legislation under which the cattle sanitary board of New Mexico was organized, and is a portion of the law regulating the animal industry in New Mexico. This legislation has, together with those provisions, for its object the protection of the cattle industry of New Mexico against destruction by either disease or theft.

The peculiar exposure of this species of property to depredation has called forth repeated legislative efforts to provide such police regulations as would be adequate to its protection, and these regulations assume that in regard to cattle

which are so easily taken possession of on our boundless plains, the police protection afforded ordinary chattels is insufficient. Thus the owner is required to brand his cattle so that they may be identified. Young cattle may not be kept in enclosures, but are required to be left to run at large with their mothers.

The title in them can only be alienated by a written bill of sale, and the owner must submit them to inspection by officers of the cattle sanitary board.

These are only some of the police regulations made by the Territory for the protection of this industry. Sections 3 and 4 of chapter 45, *supra*, are ancillary to and *in pari materia* with other sections of the law relating to the duties of the cattle sanitary board.

In considering the validity of this act it must be construed together with all the other acts which it modifies, qualifies, and has relation to. It will be seen by reference to the various acts relating to the cattle sanitary board that the legislature confided to that board not only the health of cattle, but also their protection against theft and depredation.

Sections 3 and 4 of chapter 45, *supra*, have immediate reference to sections 84, 85, 86, 87, 89, 90, 91, 182, 207, 208, 209, 210, 211, 213, 215, and 218 of the Compiled Laws of the Territory of New Mexico for the year A. D. 1897, and chapter 44, Session Acts of the Territory of New Mexico for the year 1899. This is manifest, when these separate provisions are collated thus:

> "A sanitary board, consisting of five persons, each of whom shall be a practical raiser and owner of neat cattle in this Territory, one to be appointed in and for each of the following districts: District number one, to be formed by the counties of Santa Fé, San Miguel and Taos; district number two, of the counties of Bernalillo, Valencia, Rio Arriba and San Juan; district number three, of the counties of Mora, Colfax and Union; district number four, of the counties of

Dona Ana, Grant, Socorro and Sierra; district number five, of the counties of Lincoln, Chavez, Eddy and Guadalupe. The limits of each as now constituted, hereby is created, to be known as the Cattle Sanitary Board of New Mexico."

Section 182, C. L. 1897.

"In the exercise of the powers and performance of the duties conferred and prescribed by this act, the said sanitary board shall and may make all necessary rules and regulations respecting the inspection of cattle intended for shipment or to be driven beyond the limits of this Territory; and also respecting the inspection of hides and slaughter-houses, in this Territory, and for the government of all employees of said sanitary board."

Section 208, C. L. 1897.

"Every inspector employed by the sanitary board under the provisions of section 190, shall in addition to the duties prescribed by the said act, be an inspector of brands and ear-marks, and also an inspector of hides and slaughter-houses, under the provisions of this act, and it shall be the duty of some one of such inspectors to inspect the brands and ear-marks of all cattle transported or driven out of this Territory, and to make a sworn report to the secretary of said sanitary board of the result of such inspection at least once in every thirty days, and oftener, if in the opinion of the sanitary board, it shall be necessary to do so; every slaughter-house in this Territory shall be carefully inspected by some one of the inspectors aforesaid, and all hides found in such slaughter-houses shall be carefully compared with the records of such slaughter-houses and a report in writing, setting forth the number of cattle killed at any such slaughter-house since the last inspection (or since the passage of this act, as the case may be), the names of the persons from whom each of said cattle was bought, the brands and ear-marks upon each hide, and any information that may be obtained touching the violation by the owner of any such slaughter-house, or any other person, of the provisions of an act, entitled

"An act for the protection of stock, and for other purposes," approved April 1st, 1884. For the purpose of making the inspection authorized by this act, inspectors employed by the said sanitary board shall have the right to enter in the day or night time, any slaughter-house or other place where cattle are killed, in this Territory, and to carefully examine the same, and all books and records required by law to be kept therein, and to compare the hides found therein with such records."

Section 213, C. L. 1897.

"Any person killing or causing to be killed any bovine cattle or sheep for his own use, or for the use of others, or for the purpose in whole or in part of sale or exchange, is hereby required to keep in his own possession, unchanged and unmutilated, and in condition to be easily inspected and examined, all hides and pelts of such bovine animals, including the ears, for the period of thirty days after the killing, and of sheep ten days after the killing, and shall at any time while such hides or pelts remain in his possession permit the same to be inspected and examined by any sheriff, deputy sheriff or constable, or by any board, or inspector, or other officer, authorized by law to inspect any hides and pelt or animals whether dead or alive."

Section 89, C. L. 1897.

" Every person before he shall set up and carry on the trade of a butcher or slaughterer of horned cattle in this Territory, shall file a bond, approved by the county commissioners, with the clerk of the county in which he desires to carry on the business, in a sum of not less than one thousand dollars nor more than five thousand dollars, running to the people of the Territory of New Mexico, conditioned, that he shall keep a true and faithful record, in a book kept for that purpose, of all cattle purchased or slaughtered by him, with a description of the animal, including marks, brands, age, weight, and from whom purchased, and the date thereof, and to keep the hide and horns of such animal free to the inspection of all

persons for the period of thirty days after it is slaughtered."

Section 84, C. L. 1897.

"Every person who shall be found carrying on the business of butcher or slaughterer in this Territory without having filed the bond provided in the eighty-fourth section, shall be deemed guilty of a misdemeanor, and be fined in a sum not less than fifty, nor more than one hundred dollars, for every day he shall carry on such business, to be recovered before any justice of the peace of the proper county or by indictment in the district court."

Section 85, C. L. 1897.

"Every person who shall carry on the business of a butcher or slaughterer of horned cattle, and shall fail to keep a true and faithful record, in a book kept for the purpose, of all cattle purchased or slaughtered by him, together with a description of each animal, including marks, brands, age, weight, and from whom purchased, and the date thereof, or fail to keep the hide and horns of such animal or animals for thirty days after such animal is slaughtered, shall be deemed guilty of a misdemeanor, and for each offense fined in a sum not less than ten nor more than one hundred dollars, to be recovered as provided in the preceding section."

Section 86, C. L. 1897.

"The record provided for in this act shall be open to the inspection of all persons, and also the hide and horns, for the period of thirty days, and any butcher or slaughterer refusing to permit such inspection or examination shall be subject to a fine of not less than ten nor more than twenty-five dollars, for each offense, to be recovered as provided in the preceding sections."

Section 87, C. L. 1897.

"Each violation of the provisions of this act shall be punished, in the discretion of the court in which a conviction is had, by a fine of not less than twenty-

five, nor more than one hundred dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment."

Section 90, C. L. 1897.

"Inability or refusal to show such hide or pelt to any proper authority within said period of thirty days, or a refusal to so show it at any time thereafter while remaining in the possession of the person by or for whom the animal was killed, shall be *prima facie* evidence of a violation of the provisions of this act, and shall be competent evidence to go to the jury upon the trial of any indictment against such person or persons for the larceny of any animal or animals, or for the receiving of stolen property."

Section 91, C. L. 1897.

"That in addition to the powers and duties now conferred and prescribed by law to be exercised and performed by the sanitary board created by an act of the Legislative Assembly of the Territory, entitled,—'An act to prevent the introduction of diseased cattle into New Mexico,' which became a law on the 28th day of February, 1889, the said sanitary board shall have and exercise the powers and shall perform the duties prescribed by this act."

Section 207, C. L. 1897.

"It shall be the duty of said sanitary board to cause to be inspected the brands of ear-marks upon the cattle shipped or driven out of this Territory, and to cause to be kept and preserved a true and correct record of the result of such inspections, in the office of the secretary of said sanitary board, which record shall set forth the date of the inspection, the place where, and the person by whom made, the name and post-office addresses of the owner, shipper or claimant of the cattle so inspected, and the names and post-office addresses of all persons in charge of such cattle at the time of the inspection, the destination of such cattle, as well as a list of all brands and ear-marks upon the cattle so inspected, and the number and classification of such cattle."

Section 209, C. L. 1897.

"It shall be the duty of every person shipping or driving any cattle out of this Territory to hold the same at some convenient place for inspection, as provided by this act, and it shall be unlawful for any person to ship, drive or in any manner remove beyond the boundaries of this Territory, any herd or band of cattle, until they shall have been inspected as provided by this act."

Section 210, C. L. 1897.

"It shall be unlawful for any railroad company to receive any herd or band of cattle for transportation to a point beyond the boundaries of this Territory until the same shall have been inspected, as required by this act, and until such railroad company shall have been furnished with a certificate by a duly authorized inspector, showing that the brands and ear-marks upon such cattle have been duly inspected as required by this act, and any railroad company or any officer, agent or servant of a railroad company, who shall violate the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars and not more than five thousand dollars, in the discretion of the court."

Section 211, C. L. 1897, Re-enacted by laws of 1899, Chap. 53.

"The records required to be kept by the secretary of the said sanitary board shall be kept in a well bound book, to be provided by the board for that purpose, and a certified copy of any such record under the hand and seal of the secretary of said board shall be *prima facie* evidence in all courts of this Territory of the truth of any fact required to be recorded therein by this act."

Section 215, C. L. 1897.

"The salaries of all employees and all other expenses incurred by the said sanitary board shall be paid as now provided by law, except that in addition to moneys hereafter to be raised by taxation, all sur-

plus moneys now in the treasury arising from the special tax known as the cattle indemnity fund, shall be available for that purpose."

Section 218, C. L. 1897.

CHAPTER XLIV.

An act for the protection of stock raisers, and to prevent the sale of dressed meats from animals that have been stolen in the Territory of New Mexico. S. H. B. 67. Approved March 15, 1899.

Be it enacted by the Legislative Assembly of the Territory of New Mexico:

SECTION 1. That hereafter persons engaged in the business of butchers, or of buying and selling dressed meats in the Territory of New Mexico, shall not after the passage of this act buy from any person or persons, any dressed beef, or the carcasses or portions thereof of any sheep or goat, unless the person offering such meats or any of them for sale, shall at the same time exhibit to said butcher or dealer in such meats, the hide or hides of the animal or animals from which said meat was taken, and until such butcher or dealer in dressed meats shall have entered in a book, to be kept by him for that purpose, a full and complete description of such hides, giving the ear-marks, brands of each hide so exhibited separately, and also the color, character and age of the animal, from which each of such hides was taken, as nearly as possible, at the time.

SEC. 2. That the record of marks and brands and description of hides of animals, the meat of which is purchased by butchers or dealers in fresh meats, as provided for in section one of this act, shall be preserved by him, and at all times kept in a convenient place for the inspection of the inspectors appointed by the sanitary board, of cattle owners and of any other persons who may be interested in such hides, or the animals from which the same were taken, and to the officers of the law: Provided, any person selling or offering for sale any fresh meats as described in this bill the same having been killed within the Territory, shall produce at the time of said sale or

offer for sale is made, the hides of the animal or animals, the meat of which he sells or offers to sell; And provided further, that any person in this Territory having in his possession any meat or meats from animals killed in the Territory, shall display, upon demand of any inspector, peace officer or citizens, the hide or hides of such animal or animals, the meat of which he may have in his possession.

This proviso shall not apply to nor be in force against persons who may have purchased meat from any person or persons who have displayed to the purchaser the hide or hides of the animal or animals from which said meat was taken.

SEC. 3. That any butcher or dealer in dressed meats in the Territory of New Mexico, either at wholesale or retail who shall purchase the carcasses of any cattle, sheep or goats, or shall buy any portion of the carcasses of any such animal or animals, without having first inspected the hide or hides of such animal and making the record of the marks and brands of such sheep or goats, if any, and without having made the record, the marks, brands, color and character of each hide as hereinbefore provided, shall be deemed to be guilty of a felony, and upon conviction thereof, in any of the courts of this Territory, having jurisdiction of such cause shall be fined in any sum not less than twenty-five dollars, nor more than one thousand dollars, or by imprisonment for a term not less than six months nor more than three years, or both in the discretion of the court trying said cause; Provided, that this act shall in no wise apply to dressed meats of any and all kinds which may or shall be shipped into this Territory from any other State or Territory, nor to meats purchased by one dealer from another authorized butcher or dealer in dressed meats, who has complied with the requirements of this act and with the laws now in force relating to butchers.

SEC. 4. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in full force and effect from and after its passage.

"Any butcher or other person engaged in the slaughter of neat cattle who shall kill or cause to be killed any unmarked or unbranded cattle for market, or shall purchase and kill or cause to be killed neat cattle without having taken from the person selling the same a bill of sale or transfer in writing, duly acknowledged by the vendor before an officer authorized by law to take acknowledgments, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than two hundred dollars; Provided, that nothin in this section shall apply to the slaughter of any animal owned and raised by the person slaughtering the same."

Section 125, C. L. 1897.

"Hereafter it shall be unlawful for any person, firm or corporation to offer, or for any railroad company or other common carrier to receive, for the purpose of shipment or transportatation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof, a fee or charge of ten cents, and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of purchaser and shipper of the hides, as well as the brands thereon, which said report shall be preserved by the secretary as a part of the records of his office."

"Any person, firm or corporation, common carrier, railroad company, or agent thereof, violating any of the provisions of this act, or refusing to permit the inspection of any hides as herein provided, shall upon conviction thereof be deemed guilty of a misdemeanor and shall be fined in any sum not exceeding one thousand dollars for each and every violation of the provisions of this act."

Sections 3 and 4, Chapter 45 Laws of 1901.

It will also be seen by a reference to those acts that the New Mexico legislature has also provided for the inspection of live bovine cattle before they may be removed from the exterior limits of the Territory. The object of this inspection is not for the purpose of determining whether healthy or unhealthy cattle are being transported from New Mexico, but the object is to prevent the shipper from shipping cattle from the Territory which belong to other cattle owners.

This court will recognize that for years the principal industry in great stretches of the West has been that of stock raising. The numberless large herds of that region necessarily require large areas of grazing lands in their maintenance, and have always been and must yet be allowed to range at large upon the great public domain, both because an individual ownership in any case of a body of lands sufficient in area to afford sustenance for the average herd is impracticable, and, on the other hand, the enclosure of any public lands by fences is prohibited and penalized by statute. And as was said by this court in Buford *vs.* Houts, 133 U. S., 320:

> "There is an implied license growing out of the custom of nearly one hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of the Government forbids their use."

These herds range unattended and at will for many months each year seeking their natural food, and often travel upon their quest several hundred miles, intermingling with cattle of others, until they are periodically "rounded up," separated, and returned to the ranches of their respective owners or other convenient points *for shipment.* For the purposes of identification each owner in the stock-raising States and Territories brands his range stock with a dis-

tinctive brand or device, which is by law required to be duly registered after its inspection and approval by an authorized board or officer, the object of which requirement is obvious, and to place one's brand upon a calf or maverick the property of another is made a felony. It is likewise made punishable to destroy the hide of an animal slaughtered and exposed for sale, it being required that the hide be exhibited or held for a period subject to inspection, in order that by the brand the original ownership of the animal may be determined and the regularity of its purchase and slaughter may in any case be determined.

The brand on the animal is the first link in the chain of an abstract of title to any animal. The law provides that the animal may only be alienated by a written or printed bill of sale, the execution of which must be acknowledged before some person qualified to administer oaths. Under these provisions a cattle inspector can always determine the ownership of cattle offered for shipment to points beyond the limits of the Territory. And the honest shipper may also at all times detect, by examining the brand, whether an animal belonging to a different owner has become mingled with his cattle. The brand furnishes the only evidence of ownership; and ownership is proved in that way. In the more compactly settled communities of the Mississippi Valley and New England States, the owner identifies his animal by peculiar marks on the animal, or because it is the cow with the "crumpled horn." On the vast ranges of the western States and Territories, the owner identifies them only because they bear his recorded brand.

As will be seen from a reference to the provisions of the New Mexico statutes, common carriers are prohibited from moving any cattle to points beyond the limits of the Territory until the same have been inspected, and until the railroad company has been furnished a certificate of a duly authorized cattle inspector, showing that the brands and earmarks upon such cattle have been duly inspected.

The cattle roam at large, hundreds of miles from the abode of their owner, and a dishonest shipper might include with his shipment many cattle belonging to other cattle-raisers but for the provision that all such cattle before they may be removed, either by being driven on foot or moved by means of railroad transportation, beyond the boundaries of the Territory must first be subjected to inspection.

The act complained of requiring the inspection of hides is but another provision having for its purpose the protection of the animal industry. The inspector examining the hides and tagging them is required by the act to "keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished by him for that purpose, a complete report of each inspection, giving the names of purchasers and shipper of the hides, as well as the brands thereon, which said report shall be preserved by the secretary."

If the cattle-owner has lost cattle by theft the tracing of the hide from one hide merchant to another in the Territory by ascertaining the person in whose custody the hide was last found is often the only means afforded for detecting and punishing the guilty cattle-rustler.

The local butcher is generally the market selected by the "rustler" for disposing of his stolen cattle.

Section 84, C. L. 1897, and chapter 44, Session Laws of 1899, *supra*, provide that all butchers shall keep a record of live cattle or carcasses of cattle purchased by them, showing the brands and ear-marks of all cattle so purchased and the names of persons from whom the purchases have been made. The inspector may in most cases trace a hide about to be shipped from the Territory back to the butcher who purchased the animal and in that way secure evidence for the conviction of the cattle thief; and these various provisions relating to the inspection of hides and the keeping of records of brands and ear-marks is often the only avenue left open to owners of cattle through which they may bring cattle

thieves to justice and stop depredations upon the cattle industry.

It seems plain, considering all these various enactments, that sections 3 and 4 of chapter 45, *supra*, contain provisions which prepare and fit these hides for articles of interstate commerce, by requiring that before they become such articles they must first leave with the sanitary board a record of their history and previous ownerships.

There is complete analogy between the case at bar and the case of Turner *vs.* Maryland, 107 U. S., 38. That case in our opinion enunciates the principle which should be applied to the case at bar.

An analysis of that case discloses the following facts and announces the principles of law which operate upon such facts.

The statute, the validity of which was challenged in the Supreme Court of the United States, provided:

> "After the passage of this act, it shall not be *lawful to carry out of this State*, in hogshead, any tobacco raised in this State, except in hogsheads which shall have been inspected, passed and marked agreeably to the provisions of this act," etc. * * * "and any person violating any of the provisions of this section shall forfeit and pay the sum of three hundred dollars * * *; provided, that nothing herein contained shall be construed to prohibit any grower of tobacco or any purchaser thereof, who may pack the same in the county or neighborhood where grown, from exporting or carrying out of this State any such tobacco * * * and *shall be liable* to the same charge of outage and storage as in other cases."

Other sections of the Maryland law provided for the appointment of tobacco inspectors, prescribed their duties and enumerated the data which should be ascertained and preserved by them and fixed the charge for outage (the inspection fee) at two dollars for every hogshead not exceeding one thousand one hundred pounds, etc.

The violation of this statute, like the New Mexico statute, subjected the offender to a criminal prosecution.

The plaintiff in error, Turner, was indicted for having violated this statute.

The indictment alleged that he packed in a hogshead, tobacco grown by him on a farm belonging to him in Charles county, in Maryland * * * and shipped it to Baltimore * * * that it was not weighed, marked, or passed by any inspector * * * but that the said Turner had exported it from said city to Bremen, in Germany, without procuring it to be weighed, passed, or marked by any such inspector, and further averred that the said Turner did not, prior to said exportation, pay or cause to be paid any sum of money *due for outage* to any inspector, etc.

Turner was convicted by the Maryland court, and upon a review of the judgment of the Maryland court contended that both the commerce clause of the constitution and the clause prohibiting the levying of duties or imposts upon exports had been violated by the Maryland statute, and his conviction under that statute.

It is manifest that the Maryland statute only operated on tobacco *raised in the State and packed in hogsheads* and otherwise prepared for shipment out of the State, either to some other State or to some foreign country.

The Maryland statute contained every provision which opposing counsel claim the New Mexico statute should be construed to contain. Opposing counsel make the claim that the New Mexico statute operates upon hides which are intended for shipment or exportation and upon no other hides.

The Maryland statute confessed by its direct and express terms to operate only upon tobacco prepared and packed for shipment and exportation out of the State.

The court, in sustaining the conviction of Turner by the Maryland court and upholding the validity of the Mary-

land act, found that the Maryland law did not operate upon *articles of interstate commerce*, and among other things said:

> "The legislature of the State of Maryland from the earliest history of the colony and since the formation of the State government has made the inspection of tobacco raised in that State compulsory. That inspection has included many features and has extended to the form, size and weight of the packages containing the tobacco as well as to the quality of the article. Fixing the identity and weight of tobacco alleged to have been grown in the State, and thus preserving the reputation of the article in markets outside of the State is a legitimate part of the inspection laws and means prescribed therefor in the statutes in question naturally conduce to that end. Such provisions as parts of inspection laws are as proper as provisions for inspecting quality and it cannot be said that the absence of the latter provisions in respect to any particular class of tobacco necessarily causes the laws containing the former provisions to cease to be inspection laws. * * * The things required to be done in respect to the hogshead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead as a unit, *containing the tobacco for exportation*, and for becoming an article of *foreign commerce or commerce among the States*, and ARE TO BE DONE BEFORE IT BECOMES SUCH AN ARTICLE."

And further on in the opinion the court said:

> "So, too, in the exercise of the same discretion and of its power to prescribe the method in which its products shall be fitted for exportation, it may direct that a certain product, while it remains in the bosom of the country and before it has become an article *of foreign commerce* or *of commerce between* the States, shall be encased in such a package, etc. * * * Such a law is an inspection law, and may be executed by imposing a tax or duty of inspection, which tax so far as it acts upon *articles for exportation* is an exception to the prohibition to the States, etc."

A careful reading of the case of Turner *vs.* Maryland, *supra*, discloses that the act did not pretend to operate upon tobacco sold in the State and which remained an article of domestic or local commerce, but by its express provisions only intended to operate on tobacco packed and prepared for interstate and foreign commerce.

Assuming that the New Mexico statute made the inspection of hides prepared for exportation and intended for that purpose compulsory and further assuming that the act did not operate upon any hides except such hides as were prepared and intended for exportation we would then have the exact state of facts that the Maryland statute, which was held valid, created. The principles enunciated in Turner *vs.* Maryland plainly demonstrates that the hides in question were neither interstate nor foreign commerce at the time the law operated upon them.

Turner *vs.* Maryland, *supra*, was cited approvingly in Patapsco Guano Co. *vs.* North Carolina, 171 U. S., 345, in a cause wherein an inspection law fell under the second group of inspection laws, viz., those which operate upon interstate commerce.

It will thus be seen that the Supreme Court of the United States recognizes the two classes of inspection laws and the difference in the operation upon them of the constitutional provisions cited.

Opposing counsel contend that the act in question is not an inspection law. If it is, however, a law which does not relate to or operate upon interstate or foreign commerce it is then wholly immaterial whether it is or is not an inspection law. Mere terminology does not affect it. It is "*confessedly valid.*"

The act of 1901, by its provisions, does not require an inspection and the payment of a fee therefor by reason of the fact that the hide is to be shipped from the Territory. It requires the owner and holder of the hide to submit the hide to inspection and pay the charge therefor. It does not

require the common carrier nor the shipper to pay the inspection fee. It requires every person who kills cattle to keep the hide subject to inspection for a period of thirty days and prohibits the hides being taken from the Territory unless they have been inspected and tagged by an *inspector of the district wherein they originate.* This latter requirement plainly implies that the original owner or holder, who must be the slaughterer, is the person who is primarily liable for the fee. True, if he does not pay it, the fee still remains a lien upon the hide, which lien may be enforced against the hide or may be discharged by the purchaser or shipper paying the fee upon an inspection being made.

The shipper can at all times protect himself against pecuniary loss by refusing to traffic in hides which have not been inspected and by observing the provisions of the act instead of defying them.

It is apparent that the power of the Territory is exerted upon the hides before they become articles of interstate commerce, and is so exerted without reference to whether they ever become interstate commerce. The carrier is not required to pay the inspection fee because he hauls the hide, nor is the shipper taxed because he intends to transport it or is transporting it. They are respectively enjoined from taking it out of the Territory when it does not bear the proof of having been subjected to inspection and examination.

The true method of testing the validity of a law, when attacked as being an attempt to regulate commerce between the States, is to ascertain when the power of the State is exerted upon the article of commerce. If the power of the State is exercised upon the article before it becomes commerce, then the Constitution does not limit the State's power. Its power is only limited when it attempts to regulate commerce in the article when it is actually *in transitu* consigned to another State or has been consigned to a carrier for transportation.

There is a radical difference in this connection between an

article which may be the subject of commerce and interstate commerce in the article.

In the case at bar the power of the Territory is exerted upon the hide in the jurisdiction of the Territory before it has commenced to move.

It can not and does not become an article of commerce until it has been inspected and tagged, and until then both the shipper and the carrier are prohibited from taking the hide from the Territory.

The power of the State over products and legitimate articles of commerce from States *in transitu* to it is not commensurate with its powers over its own products, which may be used as articles of commerce to a sister State.

This court has in numerous cases differentiated between legislative acts operating upon interstate or foreign commerce, and such acts which act upon articles about to become interstate commerce; thus in Coe *vs.* Errol, 116 U. S., 517.

Justice Bradley, speaking for the court, aptly and succinctly differentiates between the power of a State, exerted upon its products while yet in the State, and the attempt to exert this power upon the product after it has become commerce "among the States." The facts in that case were that a resident of the State of Maine owned a large number of spruce logs that had been carried down the winter before from Wentworth's location in New Hampshire and placed in clear stream, and on the banks thereof, in the town of Errol, to be from there floated down the Androscoggin river to the State of Maine and manufactured and sold. While at Errol the selectmen of the town assessed the logs for taxation, and to escape this tax Coe contended that the logs were protected by the commerce clause of the Constitution.

In disposing of this case, the court said:

> "The question for us to consider therefore is, whether the products of a State (in this case timber

cut in the forest) are liable to be taxed like other property within the State, though intended for exportation to another State and partially prepared for that purpose by being deposited to a place of shipment, such products being owned by persons residing in another State * * * We recur then to a consideration of the question free from this limitation; are the products of a State, although intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?

"Does the owner's state of mind in relation to the goods, that is, his intent to export them and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. This question does not present the predicament of goods in course of transportation through a State though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the supreme court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town, or station serving as an entreport for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination,

> or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State."

And in Diamond Match Company *vs.* Ontonagon, 188 U. S., 82, in a case wherein this court upheld the validity of a Michigan statute and a village ordinance enacted by virtue of the statute, under the authority of which certain logs about to be shipped from Ontonagon, Michigan, to Greenbay, in Wisconsin, were assessed for taxation, this court said:

> "Was the transit interstate commerce? We agree with counsel that it is unimportant in determining an answer whether the transit 'was by water or by railroad, or both water and railroad.' But no purpose to burden interstate commerce is evident in the statute, and the power of the State to tax everything which is part of what has been called 'the general property' or 'the general mass of property' of the State, is undoubted. But things which have been brought to a State may not have reached that condition. Things intended to be sent out of a State, but which have not left it, may not have ceased to be in that condition. The exact moment in either case may not be easy to point out—may be confused by circumstances, and the confident assignment of the property as subject or not subject to taxation is not easily made."

This court has also drawn a distinction between "articles manufactured for export or intended to be exported to another State, and interstate commerce in such articles," thus:

In Kidd *vs.* Pearson, 128 U. S., 1, in a case wherein the validity of a statute of the State of Iowa was sustained and held not to be in conflict with the commerce clause of the

Constitution, which prohibited the manufacture of intoxicating liquors *intended for transportation* to another State, this court said:

> "We have seen that whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before this court. Is that right to be overthrown by the fact that the manufacturer *intends* to export the liquors when made? Does the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, constitute an unauthorized interference with the power given to Congress to regulate commerce?
>
> "These questions are all well answered in the language of the court in the *License Tax Cases*, 5 Wall., 462, 470: 'Over this commerce and trade (the internal commerce and domestic trade of the State) Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States.'
>
> "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. The manufacture of intoxicating liquors in a State is none the less a business within that State, because the manufacturer intends, at his convenience, to export such liquors to foreign countries or to other States.
>
> "This court has already decided that the fact that an article was manufactured for export to another State does not *of itself* make it an article of interstate commerce within the meaning of sec. 8, art. 1, of the Constitution, and that the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

And in the same case observed:

> "The police power of a State is as broad and plenary as its taxing power, and property within the State is subject to the operation of the former so long as it is within the regulating restrictions of the latter."

This court has also directly distinguished between laws which act upon a product of the State while it is yet in the State, and products which are articles of interstate commerce coming into the State, thus—

In Turner *vs.* Maryland, *supra*, this court said:

> "In this case no inspection is involved except that on tobacco grown in Maryland, and we must not be understood as expressing any opinion as to any provision of the Maryland laws which refer to the inspection of tobacco grown out of Maryland."

And in Diamond Match Co. *vs.* Ontonagon, *supra*, this court said:

> "But things which have been brought to a State may not have reached that condition (the general mass of property of the State). Things intended to be sent out of a State, *but which have not left it* may not have ceased to be in that condition (the general mass of property of the State)."

The case of United States *vs.* Boyer, 85 Fed., 425, also furnishes an excellent exposition of this principle. In that case an act of Congress authorizing the Secretary of Agriculture to make regulations for the inspection of cattle, &c., slaughtered in Missouri, when the *products were intended for sale in other States and foreign countries*, was attempted to be maintained. After a thorough review of many of the decisions of the Supreme Court of the United States bearing upon that case, the regulations and the act of Congress were held void. The court excluded the Federal power on the ground that the products at the time when the Federal authority

was attempting to be exercised upon them were not interstate commerce.

That case conceded the Federal authority as paramount when dealing with interstate commerce, but excluded it when the product had not reached the domain of interstate commerce.

In the above-cited case Rogers, district judge, in reaching the conclusion he did, quoted the following language of Chief Justice Marshall in pronouncing the opinion of this court in the great case of Gibbons *vs.* Ogden, 9 Wheat., 1:

> "That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of the country; to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes. It must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given."

And the language of the present Chief Justice of this court in the case of U. S. *vs.* E. C. Knight Co., 156 U. S., 13, as follows:

> "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed; for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

The case of Cornell *vs.* Coyne, 192 U. S., 418, also enunciates the same principle for which we here contend. In that case the validity of an act of Congress was assailed which required, among other things, that "all sales or consignments made by manufacturers of filled cheese to wholesale dealers in filled cheese, or to *exporters* of filled cheese, shall be in original stamped packages."

> SEC. 9. "That upon all filled cheese which shall be assessed and collected a tax of one cent per pound to be paid by the manufacturer thereof." * * *

It appears from that case that the plaintiffs in error were manufacturers of filled cheese and entered into contracts for its manufacture and export, and under such contracts manufactured and exported 1,580,479 pounds of filled cheese. They were required by the defendant in error, revenue collector, to purchase and affix stamps to the exported packages of filled cheese. They protested against the required purchase and commenced an action for the recovery of the various sums which they alleged they were wrongfully required to pay for revenue stamps. In their declaration they alleged that section 9 of the act of Congress, and said act itself was repugnant to section 9 of article 1 of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State."

Mr. Justice Brewer, in pronouncing the opinion of this court upholding the validity of the act of Congress, said:

"Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export. While that which is asked in this case is the return of a manufacturing tax, there is nothing in the constitutional provision to distinguish between manufacturing and other taxes, and if the plaintiff's contention be sustained as to a manufacturing tax it would follow that the Government was bound to refund all prior taxes imposed on articles exported. A farmer may raise cattle with the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation. Such has been the ruling of this court. In Turpin *v.* Burgess, 117 U.S., 504, 506, where the question was as to an export stamp tax on tobacco, Mr. Justice Bradley, speaking for the court, said:—

"The constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are,—'No tax or duty shall be laid on articles exported from any State.' Art. I. sec. 9, par. 5. In the other they are,—'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports.' Art. I. sec. 10. par. 2. The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on

all property alike, and not levied on goods in course of exportation, nor because of their exportation, is not within the constitutional prohibition."

Other cases may be cited which illustrate this principle—thus in *In re* Greene, 52 Fed., 113, Mr. Jackson, circuit judge, in announcing the opinion of the court, said:

"That such commerce begins, and the regulating power of Congress attaches, when the commodity or thing traded in commences its transportation from the State of its production or *situs* to some other State or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of property in the State of its destination. When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State. At that time the power and regulating authority of the State ceases, and that of Congress attaches and continues, until it has reached another State, and become mingled with the general mass of property in the latter State. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution, and consumption thereof in the latter State forms no part of interstate commerce."

The State of New York, by law, prohibited the sale of veal from a calf under four weeks old when killed. By another provision required all veal shipped to have annexed thereto a tag stating the name of the person who raised the calf, the name of the shipper, the points of shipping, and the destination and age of the calf. In the case of People *vs.* Bishop, 94 N. Y. Supp., 774, the provision requiring the tagging of the veal was assailed as being invalid. The court in upholding its validity said:

> "This section does not prohibit the shipping or sale of veal. It merely requires that all veal that is shipped shall have annexed thereto a tag, stating the name of the person. * * * Many calves that are so shipped are over four weeks old. Such are a legitimate article of food; but many are under that age and therefore not a healthful food, nor a legitimate article of commerce for that purpose. * * * To meet this difficulty the section in question was passed. Its provisions are necessary and reasonable to complete the scheme which the legislature has devised to protect the public. * * * The purpose of its provisions is as clearly within the police power of the legislature as are the provisions of sec. 70*e* (preceding section). * * * Neither does the section violate article 1, of sec. 8, Cl. 3, of the Federal Constitution. True, the prohibition against shipping without a tag is broad enough to apply to veals intended to be shipped to another State, but that does not interfere with the regulation of commerce between the States. Hannibal & St. Joe R. R. Co. *vs.* Husen, 95 U. S., 465; Kidd *vs.* Pearson, 128 U. S., 1; People *vs.* Niagara Fruit Co., 77 N. Y. Supp., 805. Within the authority of those cases the exclusive right to regulate commerce, etc., secured to Congress by the Federal Constitution is not invaded."

In the case at bar the hides never could lawfully be delivered to or received by a common carrier for transportation without they furnish evidence by proper tagging of having been inspected. The common carrier rightfully re-

fused to receive them for transportation. They were not yet "fitted or prepared for articles of interstate commerce."

The mere act of a shipper baling his hides and in violation of law offering them to a common carrier for transportation, could in no wise constitute them articles of interstate commerce; if so, then it might equally be argued that when a shipper offers his cattle to a common carrier and perhaps other cattle commingled with his own, which he is attempting clandestinely to remove from the Territory, that such cattle have ceased to belong to the general mass of property of the Territory, and have at once become articles of interstate commerce and placed under the protection of the commerce clause of the Constitution and thereby rendered immune from territorial regulation. In the case of a cattle shipment yet another step is required before the cattle have been "prepared and fitted for articles of interstate commerce;" they must still be inspected so that it may be definitely ascertained that the shipper has not included cattle other than his own in the shipment. Until this last step is taken the cattle are still subject to the regulating restrictions of the Territory. So, too, in the case of the hides. The mere offering them for shipment can not withdraw them from the jurisdiction of the Territory. The hides still owe a duty to the Territory. Such of them as have not been previously examined and inspected must first be inspected and leave their history among the records of the sanitary board.

In Railroad Co. *vs.* Husen, 95 U. S., 465, this court held it to be "within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others, and that the police powers of a State justified the adoption of precautionary measures against social evils and the enactments of such laws as would have immediate connection with the protection of persons and property against the noxious acts of others."

The act in question is a legitimate exercise of the police power and is not dependent in any manner upon the excep-

tion contained in the article of the Constitution, which provides that States may levy imposts for the execution of their inspection laws. The inspection fee is not levied upon interstate commerce.

EVEN IF THE HIDES IN QUESTION SHOULD BE CONSIDERED INTERSTATE COMMERCE AT THE TIME THE LAW ACTS UPON THEM, STILL THE ACT IS NOT IN COLLISION WITH THE COMMERCE CLAUSE OF THE CONSTITUTION AND IS VALID, BEING A LEGITIMATE INSPECTION LAW.

Territory *ex Rel. vs.* D. & R. G. R. R. Co., 78 Pac., 75, and concurring separate opinion of Justice Pope, 79 Pacific Rep., 295.

Ever since the case of the City of New York *vs.* Miln, 11 Pet., 102, this court has held, and it has been universally conceded, that the right of inspection by a State existed as of one of its ordinary police powers, which it was at liberty to exercise quite irrespective of any Federal statute, for the protection of the health, comfort, and security of its citizens and the protection of the property of its citizens.

The power of the State to enact inspection laws, provided such laws are intended in good faith for the protection of the people, and not as a covert means for raising revenue by exhorbitant charges, is unquestioned.

See Justice Brown's opinion in Pabst Brewing Co. *vs.* Crenshaw, 198 U. S., 17–41.

The act here in question answers all the essential requirements of a valid inspection law in:

(*a*) That a necessity existed for its enactment, it being directed against a well-known and dangerous evil, namely, the theft and destruction of live stock upon the ranges, the raising and selling of which constitute the chief industry of the Territory and in many places the only industry.

(*b*) That it is not unreasonable in regard to the charges for inspection;

(*c*) That it intended and is well calculated to eradicate or at least lessen said evil;

(*d*) That it does no violence to the rights secured to the citizens of any other State or Territory;

(*e*) That it operates upon property and not upon persons;

(*f*) It can be executed without taking testimony or evidence.

The legislature and courts of New Mexico must be presumed to be perfectly familiar with conditions as they exist in New Mexico and understand the necessities of her people in regard to legislation designed to protect the property of her citizens. Whether such a law as the one now in question is necessary should be referred to the legislative department of the Territory. And the legislature having enacted it this court will hesitate to deny its validity.

As was said by this court in the case of Clark *vs.* Nash, 198 U. S., 361–65–69:

> "This court recognizes the difference of climate and soil which render necessary different laws in different sections of the country. * * * This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a State, as also its courts, must in the nature of things be more familiar with such facts and with the necessities and occasion * * * than can any one be who is a stranger to the soil of the State and that such knowledge and familiarity must have their due weight with the State courts."

Counsel for appellants contended in the court below and again here repeat that the law in question is not a valid inspection law; that the evil it is aimed to cure is essentially different from the purposes for which other inspection laws coming before this court were enacted, and because it is in that respect novel. They insist that the object of inspection laws is to improve either the quality or appearance of articles intended for exportation and attempt to limit the scope

for which inspection laws may be lawfully enacted to such laws as affect the health of a community and such as go to improve the articles of commerce. In this behalf we submit that the power of a State in enacting legitimate inspection laws, which in a measure affect and operate upon interstate commerce, is as broad and plenary as is its police power, and that valid inspection laws, which operate upon articles of interstate commerce, are but the exercise of the police power of a State, and that the executing of an inspection law is but the exercise of police regulation by examination of personal property.

This court has never attempted to define nor limit the scope which legislation may take in enacting valid inspection laws. The Constitution itself nowhere defines them. Their extent and limitation can only be ascertained "by the gradual processes of judicial inclusion and exclusion as the cases presented for decision require."

The scope of inspection laws can no more be defined or limited than can the scope of police power of which it is a branch.

In State *ex rel.* Barton Co. *vs.* K. C., Ft. Scott and G. Ry. Co., 32 Fed., 722-23, Mr. Justice Brewer, then circuit judge, said:

> "We are confronted at the outset with the fact that no one knows the limits of the police power. Many attempts have been made to define it and prescribe its boundaries, but none have as yet been so successful as to meet with general approval."

And Justice Bradley, in speaking for the court in Voight *vs.* Wright, 141 U. S., 62-'5, expressly refused to limit their operation (inspection laws), remarking that the question was "still open as to the mode and extent in which inspection laws can constitutionally be applied to personal property imported from abroad or from another State."

But Justice Miller, in the slaughter-house cases (16 Wall., 36–62), said:

> "This power [police power] is and must be from its very nature incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of citizens, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial one of property."

It extends, says another eminent judge, "to the protection of the lives, health, comfort and quiet of all persons and the protection of all property within the State; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the legislature to do this, no question ever was or upon acknowledged general principles ever can be made so far as natural persons can be concerned."

Opposing counsel also contend that the act in question performs no useful purpose, and in their brief, filed here, recite some five or six paragraphs of the original petition for the mandamus.

The allegations contained in the paragraphs are all argumentative, and go to the expediency rather than the validity of the law. They contain considerations which might well have been urged before a legislative committee, but can have no weight in a judicial proceeding where the court's inquiry is limited to the sole question of power in the legislature to enact the law.

They also complain that inasmuch as the law fails to provide for the seizing of a spurious hide by the inspector, that the hide and all evidence it contains are removed from the Territory, and the inspection is therefore a vain thing.

They entirely lose sight of the fact that the inspector is by the law required to make a record of the brands and ear-

marks upon the hide, and then forward the result of his inspection to the secretary of the board.

And further lose sight of the fact that by section 215, C. L. 1897, it is provided that the records required to be kept by the secretary of the board shall be by him kept in a well-bound book, and a certified copy of such record shall be *prima facie* evidence in all courts of the Territory of the truth of any fact required to be recorded therein.

The data which the hide itself could prove having been preserved and in such a way that use may be made thereof in courts of justice, dispenses with the necessity of keeping the hide itself within the jurisdiction of the Territory.

As we have before suggested the New Mexico legislature, entirely familiar with conditions as they exist there, legislated with the knowledge before them that New Mexico contained no tanneries, that all hides originating in New Mexico, which were not by cattle thieves or otherwise destroyed, would sooner or later find their way through the channels of local commerce to Santa Fé, Albuquerque, or Las Vegas, the principal commercial centers of New Mexico, and would from those points be sent beyond the confines of the Territory. For that reason most of the hides are inspected at those centers, while also a large number are inspected and tagged at other points in the Territory. And there being no local consumption of hides the legislature safely concluded that a law which prohibited a hide being moved from the Territory without its having been inspected and tagged would insure a record of practically all hides originating there being preserved among the archives of the board.

One illustration will at once demonstrate the usefulness of this law.

The butcher-shop and slaughter-house are required to keep a record of the names of all persons from whom cattle are purchased. If "A" sells 10 head of cattle to the butcher, the butcher records the fact, and also records the fact that the ten head of cattle were branded — T + (bar T cross).

This fact is now preserved. The hides of these cattle are kept by the butcher for thirty days, and are within that time almost certain to be tagged and inspected and the result of the inspection forwarded to the board. If not then inspected they are inspected in the warehouse of the hide merchant who intends shipping them from the Territory. The sanitary board then has the fact that ten hides branded — T + were shipped from the warehouse of the hide merchant on a given date to a point beyond the limits of the Territory. Afterwards, it transpires that the owner of the — T + brand becomes aware of the fact that he has lost ten head of his animals. He at once goes to the office of the secretary of the board, and in going over his records ascertains that a hide merchant at Santa Fé had ten hides bearing the brand — T +. The owner is at once put on the correct trail. He goes to the hide merchant, asks from whom he purchased these ten hides. The hide merchant may or may not know. He, however does, know the names of the butchers or slaughterers from whom he purchased hides he is about to export. The owner, or an officer of the law, is given the names of those butchers, some fifteen or twenty, and then each butcher submits the record of the names of persons from whom he purchased, and the brands on the animal purchased, and the cattle thief is soon run to earth.

The very fact that this law exists on the statute books acts as a deterrent to the commission of theft. The person premeditating the stealing of cattle is at once confronted with the knowledge that a complete police system requires the butcher, his only market, to keep a record of his name, as well as a description of the animal he sells.

Opposing counsel insist that inspection of articles of commerce cannot be resorted to for the prevention or detection of crime. But in Railroad Co. *vs.* Husen, 95 U. S., 465–71, this court said:

> "It may also be admitted that the police powers of a State justifies the adoption of precautionary measures

> against social evils. Under it a State may legislate to prevent the spread of crime or pauperism or disturbance of the peace. * * * All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons or such a use of property as is injurious to the property of others. They are self-defensive."

Even the most perfect legal machinery cannot avail to insure complete security of property in live animals. The stock thief or "rustler" takes care to commit his depredations in the seclusion of the prairies or the hills, generally and practically secure against conviction in a judicial forum upon evidence of eye-witnesses. To this end the law in question, together with the other provisions which it re-enforces, is directed, providing an additional safeguard against the wanton destruction of cattle in so far as that can be accomplished by diminishing the facilities which would otherwise be afforded the depredator for the convenient removal, beyond the range of detection and at a profit to himself, of the tell-tale hides.

Let these reasonable and salutary restrictions be removed then the slaughter-houses and butcher-shops will furnish a convenient "fence" for the cattle "rustler," and stolen animals will displace the animal of the honest stock raiser in the markets of New Mexico.

In the case at bar the hides were attempted to be consigned to Denver, in the State of Colorado, and consequently could not have been foreign commerce.

It is true that Brown *vs.* Maryland, 12 Wheat., 419, contains dicta to the effect that this provision applies also to the commerce between the States. This dicta was, however, expressly overruled in Woodruff *vs.* Parham, 8 Wall, 123, the court saying:

> "The term 'import' as used in that clause of the Constitution which says that no State shall levy any

> imposts or duties on imports, or exports, does not refer to the articles imported from one State into another, but only to the articles imported from foreign countries into the United States."

It has, however, been decided that, upon principle, the States have a right to make inspection laws which operate upon interstate commerce.

Patapsco Guano Co. *vs.* North Carolina, 171 U. S., 261.

Counsel cite the case of People *vs.* Compagnie General Trans-atlantique, 107 U. S., 62, and rely upon it as authority against the validity of this act and quote the following from that case:

> "A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law within the meaning of that word by calling it so in the title."

That case, however, cannot be urged as authority against the validity of the act in question. In the case cited the State attempted to exert its power not upon articles of commerce but upon human beings coming from a foreign country. In that case the court said:

> "Inspection laws and the words imports and exports, as used in article 1, sec. 10, clause 2 of the Constitution, have reference to property and not to persons, and can have no reference to free human beings."

It will also be observed that in that case the law did not operate upon property or persons of the State, but upon persons before coming into the State.

In Neilson *vs.* Garza, 2 Woods, 287, a statute of the State of Texas requiring the inspection of all hides imported and exported from and into the State of Texas was upheld by the circuit court of the United States in an exhaustive opin-

ion by Mr. Justice Bradley of the Supreme Court of the United States.

In that case it was contended that the law was void both because it attempted to regulate commerce between the States and because it attempted to lay duties on exports and imports.

In disposing of the case Justice Bradley said:

> "Now, the law in question is a general law of the State of Texas; it purports to be an inspection law, to encourage stock raising and to protect stock raisers; it makes each county of the State, except certain counties named, an inspector's district, for the inspection of hides and animals; and creates the office of inspector to be elected by the voters of the county; it requires of him a bond and oath of office; it requires him to keep a book of record of his inspections; it requires him to examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the country for sale or shipment; and all animals driven or sold in his district for slaughter to packeries or butcheries; it directs the method of inspection, branding and reporting animals and hides; it requires him to prevent the sale or removal out of the county of hides or animals upon which the brand cannot be ascertained, unless identified by proof; it gives him power to seize and condemn unbranded animals or hides. Various other regulations are imposed in the act. By the 16th section of the act it is provided that any person may ship from any part of the State any hides or animals imported into the State from Mexico, and shall not be required to have the same inspected; provided, he has first obtained the certificate of the inspector or deputy inspector of the county into which the same were imported, certifying the date of the importation thereof, the name of the importer and of the owner, and of the person in charge of the same, the name of the place where the same were imported together with the number of hides and animals so imported and the description of their marks and brands (if any there be) by which the same may be identified. By the

17th section it is declared that inspectors shall be allowed to charge and collect the same fees for the services which they are authorized to perform by the terms of section 16 as are allowed in other cases thereafter provided. The fees referred to are those allowed for inspection, which are, as before stated, from 6 to 10 cents per hide according to the number inspected.

"Now, it is contended that the examination and certificate required by the 16th section, in order to be allowed to export out of the State hides imported from Mexico, is not an inspection, but is expressly denominated otherwise. 'Shall not be required to have the same inspected' are the words, it is true. But the thing which is required, though not such an inspection as is usual and customary in other cases, is, nevertheless, an actual inspection. The exporter must obtain the certificate of the inspector, or his deputy, of the country into which the hides were imported, certifying (note what things are to be certified) the date of the importation, the name of the importer, and of the owner, and of the person in charge, name of the place where imported, number of hides and animals imported and description of their marks and brands, if any there be, by which they can be identified. What is this but inspection? The object is to subject the hides or animals to the examination of the official inspector that he may note everything about them, serving to their identification, ownership, etc."

"I do not say that such an inspection as this is necessary or expedient; but it is inspection; and at such a place as Brownsville, it may, for aught I know, be a necessary police regulation to prevent fraud and clandestine removal and exportation of property belonging to the people of Texas."

In Patapsco Guano Co. *vs.* North Carolina, 171 U. S., 345, *supra*, the Supreme Court upheld as valid a law of the State of North Carolina which required the inspection of commercial fertilizers and the payment of an inspection fee. After quoting approvingly from the opinion in Nielson *vs.* Garza, *supra*, the court said:

> "Whenever inspection laws act upon the subject before it becomes an article of commerce, they are confessedly valid. And also, when, although operating upon articles brought from one State into another, they provide for inspection in the exercise of that power of self protection commonly called the police power."

This case disposes of every question raised against the validity of the act. In that case the inspection of fertilizers was confided to the Department of Agriculture, and section 2190 enacted:

> "For the purpose of defraying the expenses connected with the inspection of fertilizers and fertilizing materials, in this State, there shall be a charge of 25 cents per ton on such fertilizers and fertilizing materials for each fiscal year ending November 30th, which shall be paid before delivery to agents, dealers, or consumers in this State. * * * Each bag, barrel or other package of such fertilizers or fertilizing materials shall have attached thereto a tag stating that all charges specified in this section have been paid. * * * Any person, corporation or company who shall violate this chapter, or who shall sell or offer for sale any such fertilizers, contrary to the provisions above set forth, shall be guilty of a misdemeanor." * * *

The North Carolina act also provided that the Agricultural Department should employ an analyst, who should inspect the fertilizers. His salary was to be paid out of the funds of the Department of Agriculture.

The complete analogy between the North Carolina statute and the New Mexico statute is at once apparent. The North Carolina statute did not appropriate all of the inspection charge to the payment of the inspector's salary, but required the inspection charge to be paid to the Department of Agriculture, and the inspector is paid a salary out of that fund for his services. The New Mexico statute likewise does not

appropriate all of the funds derived from the inspection of hides to the payment of the salary of the hide inspector, but requires it to be paid into the "cattle indemnity fund," and the inspector is paid out of that fund.

Counsel for appellant labor under the fallacy that the cattle inspector performs all the labor that is required regarding the inspection of hides. This is a mistaken view of the law. The inspection of hides is confided by the Territory to the Cattle Sanitary Board, and the money derived from inspection charges is appropriated by the Territory to the payment of the expenses of that board.

The reasonableness of the fee charged for inspection is a matter for the determination of the legislature.

Neilson *vs.* Garza, *supra.*

Patapsco Guano Co. *vs.* North Carolina, *supra.*

Turner *vs.* Maryland, *supra.*

The court cannot inquire whether the inspection fee is excessive. It can only inquire as to whether or not the fee is used for defraying the expenses of the inspection and is not appropriated to some other purpose and thereby made a means for securing revenue. This the act does not do. It requires the inspection to be made by the cattle sanitary board and the inspection fee is paid to it.

In Arizona the law requires the inspection of hides as in New Mexico (sec. 39, act No. 6, Laws of Arizona, 1897). In the case of Phœnix Wholesale Meat Company *vs.* Moss, 64 Pac., 442, an appeal pending before that court from a judgment of the district court awarding judgment in favor of a cattle inspector for services rendered in inspecting hides, was dismissed for want of jurisdiction in the court hearing it by reason of the jurisdictional amount being insufficient. The act, although open to every objection which can be urged against the validity of the New Mexico act, was upheld and its provisions enforced by the district court of

Maricopa county, and the supreme court in dismissing the appeal observed:

> "The plaintiff's recovery was in the nature of fees or compensation allowed to him as a public officer for the performance of a duty required by law. The statute which imposes upon the live stock inspector that duty also provides that he shall receive as compensation therefor the sum of twenty-five cents for each hide of horned or neat cattle inspected or tagged, to be paid by such butcher. Section 39, act No. 6, Laws of 1897. The service required by this statute to be performed was intended for the protection both of the butcher and the public, and its reasonable recompense can in no just sense be considered either a tax, toll, impost or municipal fine. We have therefore no jurisdiction over the matter in dispute in this case, and the appeal will be dismissed."

Opposing counsel also assert that the fee of ten cents per hide is excessive. The opinion of the New Mexico court in this case, as well as the separate opinion of Justice Pope, at pages 31 and 32 of the transcript, disposes of that objection. See also:

Chester City *vs.* Telegraph Co., 154 Pa. St., 464.
Western Union Tel. Co. *vs.* New Hope, 187 U. S., 425.

The inspection fee of ten cents per hide is appropriated by the law to defray the expenses of the board in making inspections and to no other purpose. It is true the funds collected on account of inspections are covered into the general funds of the cattle sanitary board. This was also true in the case of Patapsco Guano Company, *supra*.

No intention can be gathered from the law that any portion of the inspection fee is appropriated to purposes other than defraying the necessary expenses in making inspections and keeping a record thereof.

The observations of Chief Justice Fuller in the case of

Patapsco Guano Co. *vs.* North Carolina, *supra*, pages 353–354, are exactly in point:

> "Entertaining these views of the legislative intention, it does not appear to us that evidence tending to show that money collected from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of the act. *If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge.*"

It is finally objected that the law in question discriminates between different classes of citizens.

It seems unnecessary to discuss this objection.

The law acts upon hides, not persons, and upon hides whosesoever they may be.

Whenever the law operates alike upon all persons and property similarly situated, equal protection is not denied. All that is required is that all persons subject to a law shall be treated alike

Mo. Pac. R. R. *vs.* Mackey, 127 U. S., 205.
Duncan *vs.* Missouri, 152 U. S., 377.
Giozza *vs.* Tiernan, 148 U. S., 657.

In the following cases cited by opposing counsel and by them relied on, viz: Minnesota *vs.* Barber, 136 U. S., 313; Brimmer *vs.* Rebman, 138 U. S., 78, and Voight *vs.* Wright, 141 U. S., 62, State laws were under consideration which discriminated against products of other States, and were for that reason condemned. In this case there is no such discrimination.

It is respectfully submitted that the judgment below should be affirmed.

CHAS. A. SPIESS,
D. J. LEAHEY,
A. C. CAMPBELL,
Attorneys for Appellee.

Supreme Court of the United States.

No. 18.—October Term, 1906.

The Territory of New Mexico ex rel. E. J. McLean & Company, Appellant, vs. The Denver & Rio Grande Railroad Company.	Appeal from the Supreme Court of the Territory of New Mexico.

[October 15, 1906.]

Mr. Justice Day delivered the opinion of the Court.

This is an appeal from the judgment of the Supreme Court of New Mexico, affirming the judgment of the District Court of Santa Fe County, sustaining a motion to quash an alternative writ of mandamus issued on the relation of E. J. McLean & Company against the Denver and Rio Grande Railroad Company.

From the allegations of the writ it appears that the relators, the appellants here, had delivered to the railroad company at Santa Fe, New Mexico, a bale of hides consigned to Denver, Colorado, a point on the line of the defendant's railroad. The railroad company refused to receive and ship the hides for the reason that they did not bear the evidence of inspection required by the act of the legislature of New Mexico, approved March 19, 1901, which act, to be more fully noticed hereafter, made it an offense for any railroad company to receive hides for shipment beyond the limits of the Territory which had not been inspected within the requirements of the law.

An objection is made to the jurisdiction of this court upon the ground that the case is not appealable under the act of Congress of March 3, 1885. (23 Stat. at Large, 443.)

Section one of the act provides, in substance, that no appeal or writ of error shall be allowed from any judgment or decree of the Supreme Court of a Territory unless the matter in dispute, exclusive of costs, exceeds the sum of $5,000. Section 2 of the act makes exception to the application of section one as to the sum in dispute, in cases wherein is involved the validity of a treaty or statute of or authority exercised under the United States, and in all such cases an appeal or writ of error will lie without regard to the sum or value in dispute.

Confessedly, $5,000 is not involved; and in order to be appealable to this court the case must involve the validity of an authority exercised under the United States, and also be a controversy in which some sum or value is involved. This court, in the case of *Lynch* v. *United States*, (137

U. S. 280–285,) laid down the test of the right to appeal under the statute in the following terms:

"The validity of a statute, or the validity of an authority, is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

The right to legislate in the Territories is conferred, under constitutional authority, by the Congress of the United States, and the passage of a Territorial law is the exertion of an authority exercised under the United States. While this act was passed in pursuance of the authority given by the United States to the Territorial legislature, it is contended by the relators below, appellants here, that it violates the Constitution of the United States, and is therefore invalid, although it is an attempted exercise of power conferred by Congress upon the Territory. The objection of the relator to the law raises a controversy as to the right of the legislature to pass it under the broad power of legislation conferred by Congress upon the Territory. In other words, the validity of an authority exercised under the United States in the passage and enforcement of this law is directly challenged, and the case does involve the validity of an authority exercised under the power derived from the United States. It is not a case merely involving the construction of a legislative act of the Territory, as was the fact in *Snow* v. *United States*, (118 U. S. 346.) The power to pass the act at all, in view of the requirements of the Constitution of the United States, is the subject matter of controversy, and brings the case in this aspect within the second section of the act.

Is there any sum or value in dispute in this case? While the act does not prescribe the amount, some sum or value must be in dispute. (*Albright* v. *Territory of New Mexico*, 200 U. S. 9.) The matter in dispute is the right to have the goods which were tendered for shipment transported to their destination. As a common carrier, the railroad was bound to receive and transport the goods. Its refusal so to do was based upon the statute in question because of the non-inspection of the goods tendered. The relators claimed the right to have their goods transported because the statute was null and void, being an unconstitutional enactment. The controversy, therefore, relates to the right of the appellants to have their goods transported by the railroad company to the place of destination. We think this was a valuable right, measurable in money. At common law, a cause of action arose from the refusal of a common carrier to transport goods duly tendered for carriage. Ordinarily, the measure of damages in such case is the difference between the value of the goods at the point of tender and their value at their proposed destination, less the cost of carriage. We are of the opinion that this controversy involves a money value within the meaning of the statute, and the motion to dismiss the appeal will be overruled.

Passing to the merits of the controversy, Congress has conferred legislative power upon the Territory to an extent not inconsistent with the Constitution and laws of the United States. (Rev. Stats. U. S. § 1851.) It is contended that the act under consideration contravenes that part of article one, section ten, of the Constitution of the United States, which reads: "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." And also that part of the eighth section of article one of the Constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations, and among the States and with the Indian tribes.

As to the objection predicated on section ten of article one, that section can have no application to the present case, as that provision directly applies only to articles imported or exported to foreign countries. (*Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. 345–50, and cases cited.) Moreover, that paragraph of the Constitution expressly reserves the right of the States to pass inspection laws, and if this law is of that character it does not run counter to this requirement of the Constitution.

The question principally argued is as to the effect of this law upon interstate commerce, and it is urged that it is in violation of the Constitution, because it undertakes to regulate interstate commerce and lays upon it a tax not within the power of the local legislature to exact. It has been too frequently decided by this court to require the restatement of the decisions, that the exclusive power to regulate interstate commerce is vested by the Constitution in Congress, and that other laws which undertake to regulate such commerce or impose burdens upon it are invalid. This doctrine has been reaffirmed and announced in cases decided as recently as the last term of this court. (*Houston & Texas Central R. R. Co.* v. *Mayes*, 201 U. S. 321; *McNiel* v. *Southern Railway Co.*, 202 U. S. 543.) While this is true, it is equally well settled that a State or a Territory, for the same reasons, in the exercise of the police power, may make rules and regulations not conflicting with the legislation of Congress upon the same subject, and not amounting to regulations of interstate commerce. It will only be necessary to refer to a few of the many cases decided in this court holding valid enactments of legislatures having for their object the protection, welfare and safety of the people, although such laws may have an effect upon interstate commerce. (*M., K. & T. R. R. Co.* v. *Haber*, 169 U. S. 613–35; *Chicago, Milwaukee etc. R. R. Co.* v. *Solan*, 169 U. S. 133; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477.) The principle decided in these cases is that a State or Territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce,

except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce. In *Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, (171 U. S. *supra*,) it was directly recognized that the State might pass inspection laws for the protection of its people against fraudulent practices and for the suppression of frauds, although such legislation had an effect upon interstate commerce. The same principle was recognized in *Neilson* v. *Garza*, (2 Woods, 287,) a case decided by Mr. Justice Bradley on the circuit and quoted from at length with approval by Mr. Chief Justice Fuller in the Patapsco case.

Applying the principles recognized in these cases to the case at bar, does the act in question do violence to the exclusive right of Congress to regulate interstate commerce? We take judicial notice of the fact that in the Territory of New Mexico, and in other similar parts of the West, cattle are required to be branded in order to identify their ownership, and that they run at large in great stretches of country with no other means of determining their separate ownership than by the brands or marks upon them. In view of these considerations, and for the purpose of protecting the owners of cattle against fraud and criminal seizures of their property, the Territory of New Mexico has made provision, by means of a system of laws enacted for the purpose, for the protection of the ownership of cattle and the prevention of fraudulent appropriations of this kind of property. The legislation upon the subject in the Territory is thus summarized in the opinion, in this case, of the Supreme Court of New Mexico (78 Pac. Rep. 74):

"The first act relating to inspection of hides was passed in 1884, and provided that all butchers should keep a record of all animals slaughtered, and keep the hides and horns of such animals for thirty days after slaughter, free to the inspection of all persons, (Compiled Laws, section 84:) and provided a penalty for failure to keep the record and the hides and horns, (sect. 86,) and a penalty for refusal of inspection of the record or hides, (sect. 87.) In 1891 all persons were required to keep hides for thirty days for the inspection of any sheriff, deputy sheriff, or any constable, or any board or inspector, or any officer authorized to inspect hides, (sect. 89,) and provided a penalty, (sect. 90.) In 1889, amended in 1895, (p. 70, c. 29, § 4), a cattle sanitary board was created, (sect. 183,) with power to adopt and enforce quarantine regulations and regulations for the inspection of cattle for sale and slaughter, (sect. 184,) and pay to inspectors not to exceed $2.50 per day and their expenses, (sect. 190.) In 1891 the cattle sanitary board was authorized and required to make regulations concerning inspection of cattle for shipment, and hides and slaughter-houses, (sect. 208,) and there was provided the details of arrangement for the inspection of cattle, (sect. 212,) and the duties of cattle inspectors were enlarged by providing: 'Every slaughter-house in this Territory shall be carefully inspected by some one of the inspectors aforesaid, and all hides found in such slaughter-houses shall be carefully compared with the records of such slaughter-houses, and

a report in writing setting forth the number of cattle killed at any such slaughter-house since the last inspection, the names of the persons from whom each of said cattle was bought, the brands and marks upon each hide, and any information that may be obtained touching the violation by the owner of any such slaughter-houses, or any other person, of the provisions of an act entitled 'An act for the protection of stock, and for other purposes,' approved April 1, 1884. For the purpose of making the inspection authorized by this act, any inspector employed by the said sanitary board shall have the right to enter, in the day or night time, any slaughter-house or other place where cattle are killed in this Territory, and to carefully examine the same, and all books and records required by law to be kept therein, and to compare the hides found therein with such records,' (sect. 213.) In 1893 it was provided that the cattle sanitary board might fix fees for the inspection of cattle and hides, (sect. 221, repealed in 1889,) and that such fees shall be paid to the secretary of the board and placed to the credit of the cattle sanitary board, (sect. 222,) and shall be used, together with funds realized from taxes levied and assessed, or to be levied and assessed, upon cattle only, to defray the expenses of the board, (sect. 220.) Chapter 44 of the Laws of 1889 makes no changes in the law material to the consideration of this case. Chapter 53 of the Laws of 1889 provides a fee of three cents for the inspection of cattle."

In *pari materia* with this legislation the act of 1901, now under consideration, was passed. Sections three and four of that act are as follows:

"SEC. 3. Hereafter it shall be unlawful for any person, firm or corporation to offer, or any railroad company or other common carrier to receive, for the purpose of shipment or transportation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof a fee or charge of ten cents, and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of the purchaser and shipper of the hides, as well as all the brands thereon, which said report shall be preserved by the secretary as a part of the records of his office.

"SEC. 4. Any person, firm or corporation, common carrier, railroad company or agent thereof, violating any provision of this act, or refusing to permit the inspection of any hides as herein provided, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding one thousand dollars for each and every violation of the provisions of this act."

The purpose of these provisions is apparent, and is to prevent the criminal or fraudulent appropriation of cattle by requiring the inspection of hides and registration by a record which preserves the name of the shipper and purchaser of the hides, as well as the brands thereon, and by which is afforded some evidence, at least, tending to identify the ownership of the

cattle. It is evident that the provision as to the shipment of the hides beyond the limits of the Territory is essential to this purpose, for if the hides can be surreptitiously or criminally obtained and shipped beyond such limits, without inspection or registration, a very convenient door is open to the perpetration of fraud and the prevention of discovery.

It is argued that this act lays a special burden upon interstate commerce, because under the law hides not offered for transportation are not required to be inspected after thirty days in slaughter-houses and not at all outside of slaughter-houses. But legislation is not void because it meets the exigencies of a particular situation. Other statutory provisions apply to property remaining in the Territory where possibly it may be found and identified. When shipped beyond the limits of the Territory the means of reaching it are beyond local control, and it is the purpose of sections 3 and 4 of the act of 1891 to preserve within the Territory a record of the brands identifying the property and naming the purchaser or shipper. Certainly we cannot judicially say that there can be no valid reason for making the inspection in question apply only to hides offered for transportation beyond the Territory, and that for that reason the tax is an arbitrary discrimination against interstate traffic.

It is urged further that this is a mere revenue law and in no just sense an inspection law, and, therefore, not within the police power conferred upon the Territory. It is true that inspection laws ordinarily have for their object the improvement of quality and to protect the community against fraud and imposition in the character of the article received for sale or to be exported, but in the Patapsco case, *supra*, it was directly recognized that inspection laws such as the one under consideration might be passed in the exercise of the police power, and such was the view of Mr. Justice Bradley in *Woods* v. *Garza*, *supra*, decided on the circuit. We see no reason why an inspection law which has for its purpose the protection of the community against fraud and the promotion of the welfare of the people cannot be passed in the exercise of the police power, when the legislation tends to subserve the purpose in view. In the Territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against criminal aggression upon this class of property. The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the people of the Territory are interested, seems to us an obviously rightful exercise of this power. It is true it affects interstate commerce, but we do not think such was its primary purpose, and while it may have an effect to levy a tax upon this class of property, the main purpose evidently was to protect the people against fraud and wrong.

It is further urged that this law is invalid because it imposes an unreasonable fee for the inspection, which goes into the treasury of the sanitary board, and the allegations of the writ tend to show that an inspector might make a considerable sum in excess of day's wages in the work of inspecting hides under the provisions of this act. The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law. (*Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. *supra.*)

We are of the opinion that the allegations of the relator as to the cost of inspection, compared with the fees authorized to be charged, and the profit which might accrue to the inspector, in view of other and necessary incidental expense connected with the inspection and registration, do not bring the case within that class which holds that under the guise of inspection other and different purposes are to be subserved, thus rendering the legislation invalid.

Upon the whole case, we are of the opinion that, in the absence of Congressional legislation covering the subject, and making a different provision, the act in controversy is a valid exercise of the police power of the Territory, and not in violation of the Constitution giving exclusive power to Congress in the regulation of interstate commerce.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.